Caseflow Management
and
The Politics of Professionalism:
Lawyers and Independent Paralegals

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Abstract

Caseflow Management is a public sector program designed to promote effective management of cases through the resolution process in the public court system. Given its public nature caseflow management policy is ultimately an exercise in political will. To date that political will has been dominated by the legal profession which has influenced the Ministry of the Attorney General to limit the terms of reference for caseflow management and its application to a narrow range of alternatives which are primarily in the interest of the legal profession. This thesis will explain the nature and extent of the politics within the legal profession that impact on caseflow management and demonstrate the potential for better serving the public interest by expanding its terms of reference to incorporate independent paralegals and public / private sector partnerships in the Ontario Provincial Court System for highway traffic offences and other matters of a summary conviction nature.

Acknowledgment

Professor Carl Baar has made a valuable contribution to the Canadian justice system in establishing the country's first and only graduate studies level judicial administration program under the auspices of the Brock University Department of Politics. It was Professor Baar's unfailing commitment to the ongoing development of the body of knowledge that encompasses this critical component of Canada's political system that attracted me to my study of caseflow management which in turn resulted in this thesis.

The judicial administration concentration has recently been eliminated from the Brock University Politics program. I hope this thesis may in some small way provide a record of a most fascinating area of political science that was brought to life in Canada and sustained through the tremendous commitment and enthusiasm of Professor Baar.

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Preface

The label independent paralegal is a misnomer. In a work context the prefix para has become associated with the concept of working beside or along with in an independent but supportive relationship. The paramedic is arguably the best known paraprofessional with a role and function that is a good fit with the label.

Not so the independent paralegal. Indeed, in the Province of Ontario, independent paralegals are a special breed of stand-alone, quasi professionals who work very much on their own, providing unsupervised legal services to the public for a fee. If anything, they work in direct competition to, rather than beside or along with, lawyers who are members of the Law Society of Upper Canada.

That they do so is because of the politics that dominate the legal profession's never-ending determination to retain for itself the exclusive right to practise law in Ontario, not because of any inherent logic or reason that has to do with the protection of the public or betterment of the justice system in the province. In fact, this thesis will provide evidence that indicates the public is being less well served than it should be. The justice system is being hampered in its potential to provide a truly cost-effective public service that is customer/client focused because of the present monopoly status conferred on the members of the Law Society of Upper Canada. The degree to which the independent paralegal has emerged as a *de facto* alternative legal services provider is an indicator of the depth of the inadequacy of the monopoly exercised by the Law Society of Upper Canada and the public interest in exercising choice in the selection of legal service providers.

These are sweeping statements. They require substantiation in the form of well documented analysis and argument if they are to be given serious consideration. One of the primary purposes of this thesis will be to accomplish this task.

The first chapter of this thesis provides a framework for analysis of the legal profession in Ontario that is essentially political in nature. It demonstrates that professionalism is, in effect, a guise which has enabled a select group of legal services providers, i.e. barristers and solicitors, to create a monopoly in the legal services market that is primarily designed to preserve and protect their political and economic status. The extent to which the public has been protected is incidental to the primacy of the politics of the legal profession.

The second chapter provides an analytical framework for the independent paralegal that, like the previous chapter on the legal profession, is also essentially political in nature. It explains why the status of the independent paralegal remains that of a quasi-professional who functions as a *de facto* lawyer within a services jurisdiction whose boundaries have been judicially determined rather than politically bestowed; hence the *de facto* nature of the group and its quasi-professional status bereft of political recognition.

Providing the reader with these analytical frameworks lays the groundwork for outlining a change that is taking place within the professional services paradigm and the opportunity it presents for an emerging stakeholder group in the legal services field to make improvements in the application of caseflow management. Chapter three performs the essential preliminary task of explaining the nature and scope of what a paradigm is, what it means in the context of the labour market for services, and how a shift in paradigms is affecting the justice system.

This paradigm shift in the justice system is actually part and parcel of a general paradigm shift that is taking place within the public sector that is labelled "reinvention of government". Chapter three will demonstrate how the reinvention of government phenomenon is creating opportunities for delivery of legal services by independent paralegals in the Provincial Court system that are responsive to contemporary service needs of the public.

Chapter four presents an analysis of caseflow management that, on the basis of evidence developed to this point in the thesis, makes a case for looking at its application from a local legal culture perspective. In doing so, one is able to understand on the one hand, why conventional caseflow management has failed to achieve meaningful results in Ontario and, on the other hand, how recourse to an alternative that reflects the local legal culture has the potential for significant improvements over the status quo.

Chapter five of the thesis also provides a case study of how independent paralegals are providing a legal service in the Provincial Court system of Ontario that is a *de facto* example of caseflow management that reflects the local legal culture model and fits within the framework of reinvention of government.

Chapter One

The Legal Profession as a Body Politic

Introduction

Independent paralegals in the province function in an adjunct capacity to lawyers within the broad parameters of the legal profession. Their *de facto* status has been attained through bitter conflict between persons who have held themselves out as independent paralegals and court agents[1] and lawyers who have been granted a professional monopoly by the province to hold themselves out as barristers and solicitors under the auspices of the Law Society of Upper Canada.[2] A central theme of this thesis is that caseflow management reform in Ontario courts is limited in application because of the dominant political position of the legal profession in the administration of justice. This dominance has enabled the legal profession to essentially isolate the justice system from meaningful input and influence from other stakeholder groups in society. Consequently, the justice administration system is a closed rather than open system conducive to new and innovative ideas and practices. Given the legal profession's preeminent status and role, the basic framework of the profession's politics must be outlined and placed in a relevant context.

The Legal Profession - The Myth And Reality

> The modern world is the world of the professional expert. Just as pre-industrial society was dominated by landlords and industrial society by capitalists, so post-industrial society is dominated by professionals. Their power, prestige, influence and income stem from their possession of specialized knowledge attained through professional in education, guild-like training, and experience on the job -- in a word on their human capital. Just as pre-industrial society was dominated by landlords who controlled the scarce resource of land for agriculture, and industrial society by capitalists who controlled the scarce resource of physical investment in factories and machines, so post-industrial society is dominated by those who control the scarce resource of expertise in its manifold forms. 3

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1 R. v Lawrie and POINTTS Advisory Limited (1987), 32 C.C.C. (3d) 549 (Ont. C.A.).
2 R.W. Ianni, Commissioner, Report of Task Force on Paralegals, Ontario Ministry of the Attorney General, 1990.
3 Harold Perkin, The Third Revolution. Professional Elites in the Modern World, Routledge (1996) at p. 1.

Harold Perkin, the author of the above passage and Professor of History and Higher Education at Northwestern University, has devoted considerable research to the evolution of the professional in Western society. The central theme of his recent text, from which this quote is taken, is that professionals have displayed a uniform and consistent tendency in western society to set themselves up as elites who are responsible and beholden first and foremost to their profession and to use the power that accrues from their professional status to exploit the public to their socio-economic benefit.

This statement on the nature and function of professions in general, and the legal profession in particular, is a radical departure from the accepted norm within the profession. Indeed, the basic principles that are customarily associated with the legal profession suggest quite the opposite. They suggest the existence of an august body of learned practitioners who strive to deliver a highly specialized service that is in the public interest. In a much more conventional treatise on the common law, Richard Abel captures the essential elements of the legal profession by summarizing five main features put forward by the English Royal Commission on Legal Services.[4] These essential elements in an Ontario context are as follows:

1. A governing professional body. In Ontario, this is the Law Society of Upper Canada.

2. Mastery of a specialized field of knowledge through a combination of education and training. In Ontario, law schools provide the education. Articles of clerkship under the auspices of practising lawyers, along with bar admission courses administered by the Law Society, provide the training.

3. Competency based admission to a professional society. In Ontario, admission to the Law Society of Upper Canada is dependent on the passing of bar

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[4] Richard Abel, American Lawyers. Oxford University Press (1989) at p. 16.

examinations set and administered by the Law Society along with proof of competency as an articled clerk.

4. Self regulation: In Ontario the Law Society Act and Barristers and Solicitors Act give the Law Society of Upper Canada the exclusive right to regulate the practice of law.

5. An obligation to protect the public interest to the extent that the public interest impacts on the profession. The Law Society Act and the Rules of Professional Conduct pursuant to the Act require all lawyers in Ontario to act in a fiduciary capacity when retained by a client and to protect their interests before the law above all else.

When evidence is produced that portrays lawyers as just one more group of service providers attempting to maximize their income, albeit through the provision of high quality professional services, apologists lay blame on the foibles of the practitioners while extolling the institution of the profession. Two contemporary studies on the relative well being of the legal profession by respected legal scholars illustrate this point. Anthony T. Kronman was Dean of Yale Law School in 1993, arguably North America's premiere school for the pursuit of legal scholarship in its own right, when he felt compelled by his own admission to write a lament for the legal profession under the title, *The Lost Lawyer, Failing Ideals of The Legal Profession*. In his introduction he forewarns the reader of his stated dual purpose:

> In this book I have tried to do two things. I have tried first to make the ideal of the lawyer statesman (the noble professional) committed to service to the community fresh and affecting to a contemporary audience. In the eyes of many, that ideal has grown stale and unconvincing.
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> My first objective has therefore been to make it attractive again by explaining, in new but simple terms, the timeless value of the virtue that it honours and the crucial role this virtue plays in the practice of law.

> Second, I have sought to describe the intellectual and institutional forces that are now arrayed against the ideal of the lawyer statesman and that together have caused its decline.5

Mary Ann Glendon is Learned Hand Professor of Law at Harvard Law School and a respected legal scholar. In 1994 she also felt compelled to write a treatise to address what, in her considered opinion, was a disturbing decline of professional, ethical and moral standards among members of the legal profession.

In doing so she makes note of the fact that what she has to say is not an isolated academic or professional opinion and echoes the critical comments of the illustrious Derek Bok, former Dean of Harvard Law School and President of Harvard University[6]. Not surprisingly, in a book with the ominous title, *A Nation Under Lawyers: How the Crisis in The Legal Profession Is Transforming American Society*, Glendon sets the groundwork for her text in the introduction as follows:

> Over the past three decades, strange new currents have been flowing, too, among the hundreds of thousands of practitioners who make up the backbone of the legal profession. In the Law Day rhetoric of bar association officials, exhortations to uphold the rule of law increasingly have given way to self-serving portrayals of lawyers as vindicators of an ever expanding array of claims and rights.
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> In two successive revisions of its rules of ethics, the American Bar Association has removed almost all language of moral suasion, abandoning the effort to hold up an image of what a good lawyer ought to do in favour of a minimalist catalogue of themes a lawyer must not do. Conduct once strictly forbidden is now not only permitted but widely practised.7

These two quotes are significant for a number of reasons. To begin with, they depict the modern day legal profession as a group that is intent on using the practice of law as a vehicle to provide for its own self interest, albeit through the provision of a legitimate

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5 Anthon L. Kronman, The Lost Lawyer and The Failing Ideal of The Legal Profession, The Belknap Press of Harvard University Press, (1993) at p. 4.

6 Derek Bok, "A Flawed System," Harvard Magazine, (May-June, 1983) at p. 38.

7 Mary Ann Glendon, A Nation Under Lawyers. How The Crisis in the Legal Profession's Transforming American Society. Harvard University Press (1994) at p. 5.

service. The manner in which lawyers are alleged to be going about their business fits within the broad framework of the professional that was portrayed by Harold Perkin in the opening quotation to this chapter: lawyers are professionals. Who, by exercising their political power as government sanctioned practitioners of law advance their socio-economic interests.

Next, these quotes support the position of a number of contemporary critics of the legal profession who question the accuracy of the five fundamental principles listed above in depicting the parameters of the legal profession.

There is particular doubt among these critics as to the degree to which the legal profession and its self-regulatory bodies adhere to principle 4, self-regulation by standards that are designed to protect the public in the first instance,[8] and principle 5, that lawyers in their professional capacity are committed to always acting in the best interests of their clients over and above all personal consideration and potential personal gain.[9] With all due respect to lawyers, they are no better or worse than any other providers of a good or service in a marketplace system. They are primarily interested in profiting from the practice of law and using their professional status and regulatory structure of the profession to further that good.

Finally, what these two quotes demonstrate is the degree to which even the most learned legal professional scholars have been co-opted into believing in a professional myth about the nature and function of the legal profession and the practice of law that has never reflected the reality of how lawyers have come to be a self regulated profession. Brief histories of the origin and evolution of the legal profession and legal education will explain what the reality of the profession is and what the politics of the practice of law are.

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[8] Herbert M. Kritzer, First Thing We Do, Let's Replace All The Lawyers, (Unpublished Manuscript), (1995) see Chapter 1 generally.

The Origin of the Legal Profession

The legal profession that exists today in Ontario owes its origins to a number of developments that took place in England during the 18th century.[10] By that period in time, a process was well entrenched that had relegated control over the training of practitioners to a self-selected, sustaining professional body of barristers. This was a marked departure from Continental Europe where law had evolved as a discipline that was taught through university based education.[11] This early demarcation between the continental versus English approach to the training of lawyers was due to a considerable extent to the reliance placed on the common law in England as opposed to codified law, which was the norm in the rest of Europe. The common law approach to law making placed tremendous power in the judiciary who, in effect, could make the law on the basis of incremental adjudication on a case-by-case basis.

It placed the judge in the position of having considerable influence and control over not just the substance of the law, but also over its procedural aspects. Judges had control of their courts. This led to the judiciary being able to influence to a considerable degree who could appear before them and in what capacity they were to appear. It also encouraged the development of a symbiotic relationship between the judiciary and what was the beginning of the legal profession.

As early as the 15th century this resulted in an arrangement whereby practitioners in law who wished to be professional advocates before judges in the higher superior courts in London congregated in court approved associations that evolved into the now famous English barristers' Inns of Court. Members of the inns developed a cartel like arrangement with the judiciary in which they trained advocates in accordance with

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9 Ibid.

10 Charles Warren, A History of the American Bar, Little Brown and Company, 1911.

11 Alfred Zantzinger Reed, Training for the Public Professions of Law, Carnegie Foundation for the Advancement of Teaching. New York, 1921.

judicially dictated standards and the judiciary in turn restricted third party advocacy to members of the inns.[12]

By the 18th century a sophisticated *ad hoc* regulatory system had evolved. On the one hand there were the barristers. There were also professional court advocates called attorneys who were granted the privilege of being allowed to represent clients in court. They were not subject to any rigorous professional training requirements. Although initially their status as attorney had been granted through a parliamentary licensor system, by the 18th century their professional status was determined directly by the judges of the courts before whom they appeared.

There was also another group of second, or lower tier attorneys who appeared before judges in courts on routine administrative matters. In addition they acted as scriveners of legal documents, professional conveyancers on personal and real estate matters and notaries for documents. They were initially known as clerks, but by the 18th century, had evolved into an unregulated body of legal practitioners called solicitors.

Neither attorneys nor solicitors were subject to any training nor regulation of their professional conduct in a context of what would be construed as synonymous with the practice of law today. In the case of attorneys they were given authorization to practice on a court-by-court basis. Clerk / solicitors were business people who offered their services to the public on the caveat emptor principle. A reading of the source material reveals a disparate grouping of professional service providers who mirror what the Ianni Report describes as the basic parameters of independent paralegal practise in Ontario today.

To quote from Alfred Zantzinger Reed in his exhaustive history of the legal profession, "distinct from these lower and as yet disunited practitioners stood the English bar."[13] The barristers had become an elite cadre of highly educated court advocates with a rigorous system of training and self-regulation administered by the four formal Inns of Court in

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[12] Ibid.

London. They claimed to be able to trace their lineage all the way back to the historic guild of the French College of Advocates in mediaeval times. Reed is instructive in outlining the significance of the barristers in the development of the practice of law as a profession:

> They established their exclusive right to be heard as advocates or counsel (as distinguished from representing clients as attorneys) in all the higher courts, and from their ranks the judges came to be chosen. They enjoyed their privileges in the courts by virtue of their membership in one of these corporations, without judicial action in the individual case. Subject to a vague right of "visitation" claimed by the judges, each corporation was allowed to exercise unchecked control over the admission and discipline of its members. They were themselves divided into a lower order of "counsellors-at-law," or, more technically, barristers, and an upper order of serjeants. Of these, only the former now survives; and after the Restoration the technical term "barrister" came to displace "counsellor" in popular use. Our American "counsellor-at-law" continues the older terminology. For a time attorneys also had been admitted into the Inns, but in the reign of Elizabeth they were expelled. By this action the English "bar" became definitely organized, apart from the general mass of miscellaneous practitioners, as an independent and self-perpetuating professional organization whose members enjoyed a monopoly of the most highly regarded portion of legal practice and were responsible only to their associates for the proper exercise of their privileges. In the 19th century the establishment of a joint Council on Legal Education by the four inns completed the unification of this branch of the profession.
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> In the course of time the miscellaneous practitioners, following this analogy, came to be similarly associated within a single corporation charged with full responsibility, under general regulations laid down by Parliament, for admission into this second branch of the profession.[14]

The preceding quotation, although lengthy is actually a succinct analysis of how law evolved into a profession and the rationale for it. Barristers wanted to protect and enhance their status as purveyors of advocacy services to courts. The attainment of government sanctioned professional status to the exclusion of related practice groups, in other words the attainment of a monopoly guild-like status through their inns of court, was an effective means of doing so. Note the absence in Reid's analysis of any mention

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[13] Ibid at p. 15.
[14] Ibid at p. 16.

of barristers striving to protect the public good or interest. As for Perkins' statement in the introduction to this chapter, barristers were primarily interested in advancing their own interests or good.

In a struggle that paralleled that which took place between attorneys and barristers, solicitors played a lead role in lobbying the government for a similar professional status. The solicitors proved to be quick studies on how to carve out a protected practice niche for themselves. Once again Reed provides a succinct synopsis of the cycle of events that led to the creation of solicitors as a distinct profession in England.

> A "Society of Gentlemen Practisers in the Courts of Law and Equity" was established as early as 1739, and existed as late as 1822. Among its achievements was the defense of the right of its members to engage in conveyance (drafting deeds and leases) against the attempted monopoly of the London company of Scriveners. It was not until 1827 that the present Law Society was founded, and not until four years later that it received its first charter of incorporation. Since then the various groups of practitioners who are not members of the bar have been consolidated by Parliament into the single class of "solicitors." These are entitled to practice law generally (subject to the special privileges reserved for barristers) in any English court, and to secure this privilege under rules prescribed and administered by their own corporation. The analogy provided by the barristers is departed from in one respect.
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> Admission of an individual to the rank of barrister in the Inns carries with it automatically all the privileges of legal practice that barristers enjoy; the incorporated law society, on the other hand, confers upon the student in the first place the privilege of practising as solicitor, after which he may at his own option become a member of the Society. The privilege of engaging in conveyance, and of being heard as advocate in the lower courts, is now shared by both branches.15

This brief historical sketch highlights an important point that is relevant to this thesis. It demonstrates that the impetus behind the emergence of law as a learned profession was primarily the combined pursuit of political power and economic control over the provision of a bundle of legal services in the marketplace. This was not a marketplace in which barristers and solicitors were the only or even inherently preferred service

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[15] Ibid at 17.

providers. They were in a constant struggle with interlopers on their economic turf and saw the creation of designated monopolistic professional guilds that had the imprimatur of Parliament as a means of protecting and enhancing the means of barristers and solicitors to earn a livelihood. They believed they were providing a service to the public that should be accorded the status of being in the public interest. This was the decided opinion of the professional service providers and not a measure of public opinion.

Historical records on the status of law within English society indicate that there was widespread belief within the general populace that practitioners of law, regardless of their classification as attorney, barrister, conveyancer, scrivener or solicitor, were people who were intent on making a profit from the provision of legal services. And the public was less than enamoured with what they perceived as a cabal of shrewd wordsmiths, who through mastery of information and access to sources of power, were able to profit from the problems of the common person. In his history of the American bar, Charles Warren provides numerous accounts of the ongoing almost hostile relationship between the English public and emerging professional providers of legal services.[16]

With respect to the Province of Ontario, R. D. Gidney and W. P. J. Millar have written a thorough account of the evolution of the learned profession in the 19th century. Here is their account of the public perceptions of lawyers and the Law Society of Upper Canada based on topical reports from legislative records and newspapers from the 1870s through the 1880s. At issue were efforts by the Law Society to convince the legislature to restrict court appearances and conveyancing to its member lawyers at the expense of lay court agents and conveyancers.

> And the debate over the Division Courts bill first introduced in 1878 revealed a reservoir of anti-lawyer sentiment, in both the legislature and the press, which not even lawyers could ignore. Letters poured in to the papers defending the competence of lay practitioners, and the rights of poor men everywhere to pursue cheap justice unencumbered by fee-hungry lawyers. Said one conveyancer from Paisley, in a tone that eerily evokes the ghost of William Lyon Mackenzie, "We are the law Grangers

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[16] Charles Warren, A History of the American Bar, Little Brown and Company, 1911.

> who rescue the poor man from the fangs of the lawyer... If we can stop the work of country lawyers, they and their dependants, the noble 260 who thrive in Toronto, will be simultaneously starved out...We cover the land in every quarter. Go where he will, he will find a conveyancer every five miles in the country employed in the noble work of peace-making by repressing all litigation, and advising settlement of all disputes by arbitration." Solidly behind the Mowat government on this issue, as indeed on most others, and reading the popular mind reflected in his own correspondence columns, the editor of the *Globe* had great fun at the lawyers' expense.[17]

In short, in their pursuit of monopoly professional status, barristers and solicitors in England and Ontario were primarily intent on protecting and furthering their own professional interests rather than those of the public.

Gidney and Millar's history of the early development of the Law Society of Upper Canada contains numerous accounts of how barristers and solicitors constantly complained of the economic threat that the mass of unlicensed providers of legal services were to their ability to earn an adequate income from the practice of law. There was little concern being articulated about the provision of cost-efficient or client-centred legal services to the public. The impetus for their desire to obtain a monopoly over the provision of all legal services was to further their economic interest.

> As the radical "root and branch" critique of professionalism faded away in the early 1850's, the legitimacy of lawyers' professional privileges came to be taken for granted, at least by those who were thought to matter in Upper Canadian society. Moreover, leading lawyers found it relatively easy to extend the power of the Law Society in any of those areas defined as within the prerogatives of the profession. The Benchers moved resolutions and consulted with professional men in the cabinet, and laws were passed raising educational standards, or circumscribing attorneys, or extending lawyers' roles in the courts, all without public debate, without a public outcry, without, indeed, apparent public interest. Secure behind the bulwarks of the Law Society Act, controlling many of the levers of power in society, constituting a key element of the economic and social elite, the law, as an organized profession, had little difficulty obtaining the objectives it set for itself. It may not in fact have been that easy, but certainly the surviving public record makes it look that way.[18]

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17 R. D. Gidney, W.P.J. Millar, Professional Gentlemen. University of Toronto Press (1994) at p. 314.
18 Ibid at p. 81.

In deference to these pioneer barristers and solicitors, there is ample evidence to indicate that in some instances the public was being less than well served by a horde of untrained and unlicensed providers of legal services. Real estate conveyancers in early 19th century Ontario, particularly in rural homestead country, did create some formidable 20th century entanglements for unfortunate holders of dubious titles to land conveyed through defective legal instruments drafted by a grab bag of local conveyancers whose only claim to expertise was a notarial stamp issued through patronage application by the government of the day.

Gidney and Millar indicate that there was genuine concern within the legislature and the legal profession about the plight of unfortunate members of the public who might suffer serious legal harm at the expense of lay practitioners, no matter how well intended those service providers might be. However, this issue in itself was never seen as being a matter of serious public concern. As long as there was sufficient legal work to support both the formal legal profession and lay practitioners, the Law Society was prepared to let the marketplace dictate whom the public chose as their preferred professional services providers.

> So long as the number of lawyers remained small and most practised in the larger towns and cities, there was apparently enough work for both professionals and laity, and thus conflict between the two groups remained muted. Lawyers controlled the county and superior courts, carried on most of the complex or special conveyancing, and more generally could rely on the routine business of all those prosperous citizens who wanted professionals to tend to their affairs. Laymen tended to pick up any remaining business, combining conveyancing with a variety of other services such as land surveying, insurance, real estate, accounting, or similar activities. Since lawyers and laity didn't compete against each other, professional complaints about lay conveyancing, though frequent enough from the mid-1850s to the mid-1870s, tended to take the form of sporadic grumbling rather than insistent or concerted demands for protection.[19]

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[19] Ibid at p. 257.

This state of affairs throughout much of the 1880s mirrors the symbiotic relationship that exists today in Metropolitan Toronto between lawyers, who are members of the Law Society, and independent paralegals. Generally speaking, lawyers practise law and paralegals function in a wide variety of legislative and court sanctioned paraprofessional areas as well as what are known as "grey areas". The latter technically encroach on the practice of law but are provided by independent paralegals under the guise of legal typing services in areas such as simple incorporations and uncontested divorces.

It was only when the economics of the profession appeared to be threatened in the 19th century that lawyers became concerned enough about the public interest to exert pressure in their professional societies and legislatures for tighter monopoly control over the supply of legal services. Again, in a situation that mirrors the tension between lawyers and independent paralegals in the 1990s in small town and rural Ontario, it was small town and rural practitioners in the 1880s and 1890s who led the drive to exclude lay practitioners from providing legal services that were a competitive threat to them.

> Unlike the situation in the cities, or even in the smaller county towns, lay practitioners posed a serious economic threat to country lawyers because both groups competed for the same scarce dollars. "A country solicitor's practice is to a great extent built up by conveyancing: but the fact is, nearly all the conveyancing outside the cities is done by non-professional men," said one: "take away from a country solicitor his conveyancing, his surrogate practice, his collecting, and a great deal of his Division Court work, and often his advising, and what, I say, have you left him?" By the early 1880s, indeed, the editor of the *Canada Law Journal* could declare that lay conveyancing, or "Professional Inciters" as he called them, was the "burning question amongst country practitioners."[20]

Given the above, it is open to debate as to whether the history of the nature and state of legal services and the origin and evolution of the legal services providers have ever placed the public at a state of risk that required the legal profession to be given monopoly control over the provision of legal services in order to protect the public interest. Indeed, a comparison between the practice of law in 19th century Ontario and the United States is illuminating in this respect.

The Law Society of Upper Canada can trace its professional regulatory origin back to 1797.[21] Relatively speaking, the practice of law in Ontario for the first half of the 19th century was much more highly regulated than was the case in the United States.[22] In fact, in their efforts to release themselves from the shackles of colonial domination, the newly minted United States of America were extremely reluctant to grant any sort of monopoly professional status to lawyers.[23] Consequently, the practice of law was to a considerable extent an unregulated profession in many of the United States in the first hundred years of the country's existence and, at best, subject to minimum control whether by government or professional bodies, in those states where there was professional regulation.

Anton Herman-Chroust has written a two volume history of the evolution of the legal profession in the United States. In Volume II, covering the post-revolutionary period, he provides the following example of how the American public reacted to attempts by lawyers to have themselves granted official professional recognition.

> Open hostility rather than fair recognition was accorded to any professional group which sought privileges, even though they were only the privileges and duties springing from a common membership in a learned profession. Hence, it was no mere accident that the New England "bar organizations" and "bar meetings" should come to a sudden end during the era of "Jacksonian democracy." The Suffolk Bar, as has been shown, disbanded in 1836, as did the bar of Cumberland County in Maine.

The fraternity of the Suffolk Bar suffered the same fate soon after 1831, and the Bar of the District of Maine came to an end in 1829, although it continued to linger on as the Bar of Kennebec County until 1841. The Bar of Franklin County in Massachusetts disappeared in 1835, and the Bar of Grafton County in New Hampshire ceased to operate in 1838. The Bar of Essex County in Massachusetts miraculously managed to survive until 1856, but an attempt to start a State Bar Association in Massachusetts in 1849 failed

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20 Ibid at p. 258 - 259.
21 Ibid.
22 See 8 at p. 12 - 15.
23 See 10 at p. 12 -15.

dismally, as did a similar effort to form a Legal Alliance in New York in 1835. The "bar meetings" held in Connecticut (since 1783) and in Vermont (since 1797) simply passed out of history. The laments uttered by the Cumberland Bar in Maine could certainly be echoed by the whole American legal profession: "[U]nder the hostile system of legislation that...prevailed [in the several states]...the members [of the original bar meetings]...have yielded in despair to the spirit of reckless innovation upon old and established principles, and the [bar] organization[s]...have fallen into decay."[24] It is open to debate that the public in these emerging United States was any more at risk from the lack of regulation of the legal profession through a professional services monopoly than was the case in Ontario with its formally structured legal profession under the auspices of the Law Society of Upper Canada. What one does encounter in the U.S. is virtually the same sort of rhetoric that was used in England and Upper Canada by advocates for the formal professionalism of the law.

This brief history of the common law legal profession also sheds light on the emergence of a most important development in judicial administration and the origin of two distinct approaches to judicial independence. Prior to the emergence of the respective professional monopolies of barristers and solicitors, the judiciary played an active and dominant role in supervision of providers of legal services, at least those that were court related.[25]

By the early 19th century the American Revolution had inspired the United States of America to go its own way in the conduct of its social and political affairs. With respect to law and the legal profession, the nation and individual states constructed a legal system that remained rooted in British common law until the date of the Revolution, and was subsequently adapted to fit within the parameters of emerging American society.

At the time of the Revolution the passing of the regulatory torch from the judiciary to the respective monopoly professions of barristers and solicitors had not yet taken place in England. The American legal system embarked on its separate path with a judiciary that

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[24] Anton-Herman Chroust, The Rise of the Legal Profession in America. Vol. II, University of Oklahoma Press (1965) at p. 157.

reflected 18th century England. It is a system that evolved in its own way subsequent to the Revolution. In contrast, the Canadian and Ontario legal systems evolved in a manner that paralleled developments within the legal profession in 19th century England. Among other things, this entailed the judiciary leaving the control over the conduct of the profession and the status of those who appear before it to the Law Society of Upper Canada.[26] Over a period of time this has contributed in a large part to the evolution of a judiciary which has adopted a hands off attitude with respect to supervising the conduct of the legal profession.

For the legal profession this has resulted in a state of affairs in which they work as principal stakeholders in a process where they have monopoly control over both the designation of eligible players and steerage of the actual events that constitute the process. This would be a difficult situation in which to avoid the potential for a conflict of interest in the best of circumstances. In the case of the legal profession it has become further complicated because of developments that have taken place in professional training and development and competency-based admission.

The initial decision in England to relegate regulation of barristers to the Inn-based guilds was a rational one. The Inns had invested considerable resources over a long period of time in the development of a high quality professional development program for members. In fact, the calibre of professional training through a combination of reading law and apprenticeship tutelage had reached such a high level by the beginning of the 19th century that it became customary to appoint high court judges only from among their ranks.

This was a marked departure from continental Europe where the judiciary and lawyers undertook training under two distinctly different university streams. In England, and subsequently Ontario, the professional societies became the training ground for both practitioners of the law and judges. Moreover, the route to becoming a judge was through training and work as a practitioner of the law for a period of time as a

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[25] Ibid 10.

qualification for appointment to the bench. This has had the effect of instilling a uniform professional culture in the two professions. It has created a symbiotic professional relationship that is so interwoven that judges and lawyers in the common law system have become equated as two divisions within a common profession as opposed to two distinct professions.

One of the more important outcomes of this development has been the evolution of a hybrid legal education system that has taken on the academic responsibility for training of both lawyers and potential judges. Not all lawyers will become judges, but in practice, through well-established conventions, judges will be law school graduates.

This outcome was not the result of rational planning. It happened over a period of years because of the manner in which law school education supplanted professional training as the preferred method for acquiring entry into the legal profession. This has had serious ramifications for the practice of law and is arguably one of the primary factors in steering legal education away from practical training to the academic discipline of jurisprudence. The following details how this came about and the implications it has had on the practice of law.

Legal Education

The legal profession is a learned discipline that is reliant on a university based professional school system to equip practitioners with the core competencies deemed necessary to qualify as members. For historical reasons that system has evolved into one that is self-serving rather than serving the public interest.

The year 1870 has a special significance for lawyers in North America even though the great majority have no idea of the nature and impact of the event that took place at Harvard Law School. That was the year that Charles W. Eliot, the patrician Bostonian

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[26] bid 11.

who had been recently elevated to the presidency of Harvard University, decided to apply the scientific method of learning that was popular in many of the university schools, most notably the professional school of medicine, to the professional discipline of law.[27] Students enrolled in the fall semester of 1870 at Harvard Law school were introduced to a newly conscripted Dean, Christopher Columbus Langdell, who like his namesake, started them on a voyage to the new world of learning the law, the case method.

Up to that time legal education in North America was a free form exercise.[28] In fact, law schools in their own right were just emerging as institutions of learning for the legal profession under the leadership of Harvard and Yale Universities. It was common place for lawyers to receive their training through apprenticeships in law offices under the tutelage of experienced practitioners. In the United States this had evolved into a system whereby the aspiring student at law learned the craft of law through a combination of self-instructional reading, attendance at a college or university to take a smattering of law courses that varied in form and content depending on the bent of the teacher and school, and practical work experience. When they felt prepared, they presented themselves for examination by the state court system and were duly appointed as attorneys and counsellors at law.

In Canada, provincial law societies were given self-regulatory professional powers much earlier than their counterpart state bar associations. In fact, the Law Society of Upper Canada, the governing professional body for lawyers in Ontario, has been in continual existence as a self-governing professional body since 1797.[29] A component of the self-governing status has been the right to train barristers and solicitors and deem them suitable for practice by admitting them as full fledged members of the society. According to Gidney and Millar "it had been engaged in the formal instruction of lawyers since 1854, and had a law school operating more or less continuously since 1861."[30]

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27 Robert L. Stevens, Law School Legal Education from the 1850's to the 1980's, The University of North Carolina at Chapel Hill, 1983.
28 Ibid see Chapter 1 and 2 generally.
29 See 17 at p. 11.
30 See 17 at p. 371.

The Law Society administered a combination of articled clerkships and inhouse education and training programs to prepare lawyers for admission. This was very much in keeping with the basic principles of the English system. Courts had the inherent right to examine any advocate that appeared before them and rule on their suitability for professional practice. However, this right was residual in nature and admission to the Law Society was accepted by the judiciary as *prima faciae* proof of professional competency.

All that was to begin changing as of 1870. This was because the case method introduced by Langdell was just that, a methodology.[31] It wasn't just a compilation of cases intended to give introductory law students a look at what courts had decided on the basis of the facts of a case and how they had arrived at their decision. Lawyers and students at law were well versed in the reading of cases. In a common law system, one had to rely on judge-made law through judgements rendered in actual cases to determine what the law was in a given situation and to provide justification for pleading its application in a certain manner in the case at hand. However, case law was until that point in time read and interpreted on the basis of the fundamental English principles that there was no inherent logic in the body of case law and that it reflected the socio-political mores and customs of the time.

The case method prepared by Langdell was but one step in the transformation of legal education to the scientific discipline of jurisprudence. Cases were to be read from a scholarly perspective. The purpose in reading the case was to extract information which could be formulated into legal principles and doctrines. These would then become universal truths into which all legal problems could be categorized.

One of the primary goals of jurisprudence is to construct a legal argument and/or legal opinion. Lawyers take a given fact situation. They analyze it on the basis of a jurisprudential application of previously decided cases that have an association or similarity to the fact situation. They formulate a legal opinion by synthesizing the fact

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[31] See 27 generally

situation with the jurisprudential information contained in the cases studied and render that legal opinion to the client.

This approach to problem identification, analysis and solving is not unique to the discipline of law. The jurisprudential paradigm conforms to what is known in academic scientific circles as the Newtonian or machine model. It is named in honour of the famous 17th century English scientist, Sir Isaac Newton. The Newtonian model adheres to what he labelled the objective or scientific method. The scientific method takes as its underlying premise that physical objects or intellectual properties and principles can be best understood through a process of isolated analysis of its component parts. We take the object or matter to be studied and break it down into component parts. If it is a legal matter or issue, this means we break it down into facts that have a legal or evidentiary basis.

Once the essential facts have been identified that are relevant to the case at hand, they are isolated and analyzed. On the basis of the scientific method, once the essential components are understood, the physical object or intellectual matter or issue can be reconstructed using those components as the building blocks. In the practice of law, the jurisprudential scientific method forms the cornerstone of the conventional practice mode. The client explains the matter or issue to the lawyer. The lawyer uses jurisprudential principles to analyze the matter or issue. The lawyer isolates the essential legal facts and builds a "legal case" around these essential facts. The lawyer then meets with the client and explains the matter or issue to the client within the context of the "legal case" and renders a "legal opinion".

If one adheres to the scientific method model and follows its principles, then the legal opinion the lawyer renders to the client should encapsulate what the client originally told the lawyer and formulate a logical explanation with an appropriate recommendation for some form of response or suggested course of action. What the lawyer has done is to enunciate the issue in a jurisprudential context.

That's the theory. In practice it has never been perfect. Stories abound of clients who maintain they went to a lawyer to ask a simple question and were given a complex answer that had little or no bearing on their basic question. However, the conventional practice of law worked because all of the other professional paradigms operated on the same wavelength. This resulted in lawyers developing a philosophy about the practise of law and its capability to service the public interest that was conveniently self serving.

Indeed, the scientists themselves were addicted to the scientific method. Doctors believed they could find the cure to any disease and rebuild the human body by isolating the symptoms and identifying the disease in laboratory conditions. Engineers believed they could reshape the earth and harness it for maximum economic and social efficiency by diverting rivers, building dams and transforming the physical landscape. Even business got on the bandwagon by adhering to the principles of scientific management.

The practice of law was in what can be labelled a "compatible paradigm". It became an accepted part of the solution when legal issues or problems surfaced in these other compatible paradigms.[32]

Dean Langdell was not a practising lawyer, but rather a legal scholar. In this respect he was somewhat of an anomaly within the legal education community. Most legal training was closely associated with practitioners and, in some cases, judges and magistrates. In fact, the existence of law schools at that period in time was very much dependant on the personal charisma and stamina of a leading practitioner. Law schools came and went depending upon the rise and demise of a cadre of committed practitioners.[33]

By advocating the jurisprudential case method, Langdell was staking out a new discipline, academic legal scholarship. The law could be best interpreted and mastered through the intellectual pursuit of the rigorous discipline of jurisprudence. You did not need to be a practising lawyer to become learned in the law and its application. In fact,

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[32] See 27.

the academic who was prepared to remove himself from the distractions of the practice of law and commit to the discipline of jurisprudence was best positioned to become the expert. Expertise was associated with academic learning as opposed to proficiency in servicing the client.[34]

This point was brought home loud and clear to the legal profession in the year following Langdell's introduction of the case method. In 1871 Harvard Law School set a precedent by appointing a legal scholar to the law faculty who was not a practitioner of the law and had no intention of becoming one.[35] This person was a dedicated legal scholar who would make students learned in the law by teaching them the rigours of jurisprudence. The reinvention of law as an academic discipline was a boon for universities and a bane for the profession. Universities were provided with the opportunity to tap into a new academic discipline, law, and develop law schools. Lawyers were losing a grip on the control of the critical training component of their profession. People were being educated on the theory and principles of jurisprudence at the expense of hands on practical skill-based professional training. A struggle ensued between the universities and the profession in which the universities emerged victorious by the early part of the 20th century.

In Canada, there was an important variation to this struggle. Law societies had the right to control admission to the profession. They have used this right to implement their own bar admission education program. However, like the U.S., the university law school eventually emerged as the primary education source for the legal profession by the mid 20th century. One of the consistent complaints one encounters at law practice symposiums in Canada today is that newly minted lawyers are long on jurispurdential knowledge but deficient in practise skills.

There were arguably larger forces at play than the politics of the profession alone that contributed to the decline of the apprenticeship model for the training of lawyers and its

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33 Ibid.
34 Ibid.
35 Ibid.

replacement with the university model of professional education. Technology was most certainly a dominant force. It is not coincidental that the invention of the typewriter, mass production printing and carbon paper, and the revolution they created in 19th century information technology, made practising lawyers less reluctant to see the end of a bevy of indentured clerks who were no longer needed for copious conveyancing work. Gidney and Millar make a persuasive argument for the critical role of technology in the demise of the traditional articled clerk and the natural evolution of the university law school as a next generation substitute.

> By the end of the 1880s, however, there were few voices opposed to compulsion (compulsory attendance at a university law school) *per se*. While undoubtedly attributable to a number of things, that shift may also have occurred because of changes within the law office itself. One of these was the application of new technologies to the work traditionally done by law students. "Lex," one of those who opposed compulsion, had remarked in passing, "The pressure to get into leading [Toronto] offices is so great that in some offices the students have desks, but have nothing to do. The use of shorthand and typewriters has taken from the students much work, by some called drudgery, but withal, work which was rich in instruction."
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> It is possible, in other words, that these sorts of innovations made the presence of students less useful to principals, who now needed or could make more use of, specialist skills that students lacked.[36]

In the United States, law schools took control of professional legal education and eventually set the terms of reference for state bar examinations which controlled admission to state bars. In Canada, provincial law societies, acting incrementally over a period of years, ceded control of a substantial portion of professional training to university law schools by allowing time spent in universities to replace years of indentured clerkship. However, they retained the right to supplement law school education with bar admission training programs run by the societies. Eventually these bar admission programs took on an academic tone and have become a review of what students encounter in law school, albeit with distinct provincial flavours. Practically,

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[36] See 17 at p. 374.

articling students question their merit. Politically, bar admission programs represent an element of control over entry to the profession law societies are loath to relinquish.

More than a century later, legal education has become a learned discipline that has at best a marginal association with the contemporary practice of law. Learned legal scholars, who have an overwhelming association with graduate level studies at a few "leading" law schools, dominate the teaching of law at North American law schools. Look at any American law school calendar and you will find that graduates from Harvard, Yale, Columbia, Chicago and Michigan constitute anywhere from 25% to 50% of the faculty.[37] In Canada, this is complemented by faculty who have attended Oxford and Cambridge "the Oxbridge" connection.[38] A small closed network of self perpetuating legal scholars who are beholden to academe rather than the world of legal services dominate legal education.

One has to wonder why leading law firms expend so much time and effort visiting a number of law schools looking for students with special skills. For the most part, every law school in North America is caught up in a uniform mindset and education culture controlled by professors who all emanate from the same narrow base.

Law students who attend the leading law schools are learning the same things from professors who have been taught those same things at the same set of schools. The law school teaching profession has become a self-perpetuating and self-sustaining oligarchy.

In an era that is crying out for innovative approaches and different solutions to new problems it is not surprising that there is not a sufficient quantity or quality of new approaches emanating from law schools. True, if one peruses a current law school calendar for a major law school there is a litany of contemporary subject offerings in areas like environmental law, human rights law, poverty law and so on, that on the surface appear to be in tune with the legal service needs of modern day society.

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[37] Gordon Otto, John Mixon, "Continuous Quality Improvement, Law and Legal Education," Emory Law Journal, Vol. 43, No. 2 (1994) at p. 393.

However, an examination of curricula invariably indicates that these are merely exercises in current application of jurisprudence. Law professors have been cocooned into the pursuit of jurisprudence. Moreover, the emphasis on academic scholarship creates its own vicious circle in which the teaching community has become obsessed with research and writing on a litany of legal subjects that have marginal interest or value beyond the narrow confines of the academic community. The North American law school community is responsible for the publication of over 400 learned legal journals that contain weighty tomes designed primarily to bolster the credentials and standing of law professors within their closed academic community.[39] One might argue that this is the case for all academic disciplines. However, it creates a problem with a special dimension in professional schools which lead into professions that have a monopoly of control over what range of services the public is legally entitled to obtain.

This emphasis on academic scholarship has had an unfortunate spillover into the legal profession. Lawyers, who are products of these law schools, have become indoctrinated on the value of academic prowess as the measurement of professional capability. This indoctrination starts from the first semester of their tenure at law school. The top academic students are lauded by law professors as the most learned. The academic culture is so strong that it survives in practice where lawyers are recruited on the basis of academic standing only to learn that it is only one among a necessary set of professional skills required to establish successful client relationships.[40]

This induces law firms, particularly the large leading firms, to spend an inordinate-amount of time, energy and money attempting to recruit the class leaders in a law school as entry-level associates. Once hired it then takes the firm a substantial period of time to train these former high achieving students to become moderately functional lawyers. They are not cost-effective legal services providers and must be brought along in the firm as associates for their first, second and third years of practice. However, the subsidization factor required to sustain this core group of associates is heavy and results in clients' bills

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[38] Based on a manual search by the author of law school calendars of University of British Columbia, University of Calgary, Osgoode Hall and University of Toronto.

[39] See 37 at p. 461-463.

being factored accordingly. This is a subsidization that knowledgeable clients in particular are beginning to resist.

On a larger scale this entire law school process has created a much more serious problem for the legal profession. Lawyers have become a profession equipped with a very narrow scope of professional training in the field of jurisprudence that has increasingly limited application in an expanding professional services marketplace. Moreover, the legal profession is caught in a no-win situation within this status quo. They cannot respond to emerging developments in the professional services marketplace because they have no control and, at best, a limited input into professional training and development. The natural nucleus for the generation of new ideas and approaches to legal services is dominated by legal academics who have little interest and association with the profession they purport to serve.[41] It has become an educational cartel that is able to dictate to the profession what it chooses to supply leaving the profession with little alternative.[42]

There are only nine states left in the United States, California being among them, that provide for entry into the profession through direct examination without the prerequisite of a degree from an accredited law school.[43] In Canada, although the law societies still control entry into the profession, one of the eligibility requirements is a degree from an approved law school.

The legal education problem is correctable. There are both short-and long-term remedies available to the profession. In the short term, lawyers and law firms are going to have to move quickly and aggressively to make up for the law school deficiency through firm-sponsored professional training and development. In the long term they should begin to work through their respective state bar associations and provincial law societies to make law school education more responsive to emerging developments in the new marketplace for legal services.

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40 John G. Kelly, The New General Counsel. Emond Montgomery Publications, Ltd.. Toronto 1998. see chapter 6 generally
41 Ibid at Chapter 2
42 See 8 generally.

The short-term remedies must be driven by the fundamental guiding principle that lawyers must make the shift from being practitioners of law to providers of client-centred legal services. This will lead to them in a direction that will focus not just on having their current bank of core competencies, which have limited value in their own right, but to thinking laterally and moving proactively to acquire core competencies for which there is a growing demand. Lawyers must let go of law and move beyond it to creative legal services.

In doing so, they must acknowledge the legitimacy and equivalency of related professional and paraprofessional services and develop strategic service alliances with them. Lawyers have not been trained to do this. They have been conditioned through three years of law school indoctrination to become professional iconoclasts. It's time for lawyers to join the professional services mainstream.

State bar associations and provincial law societies must take a long hard look at the monopoly of power over legal education they have given to university-based law schools. As is the case with most monopolies, particularly unregulated ones, these university-based law schools have taken advantage of the situation to create comfortable niches for law professors at the expense of lawyers and law firms and, most importantly, the general public. A narrow perspective in the law and case based jurisprudence, a skill which can be learned in one year, has been reconfigured into a three-year law school program. Law students are overskilled in jurisprudence and seriously underskilled in the realities of the actual provision of professional services to clients.

They graduate and are put into areas of practice, such as family law and dispute resolution that require multi-disciplinary approaches, with little or no awareness beyond knowledge of the jurisprudential aspect of the field.

There is certainly room and scope for three years of professional training at university law schools. However, law schools must adapt what has been labelled a macro justice

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[43] See 8 generally.

approach.[44] A variety of interrelated disciplines must be brought into the law school and integrated into the legal education curriculum. For example, litigation should be augmented with subjects such as alternative dispute resolution (ADR), case/caseflow management and litigation support management. The paraprofessional perspective must be brought into the mainstream of legal education. It is an almost ludicrous sight to encounter a recent graduate from the top of his or her class at a firm after three years of supposed intensive training, who knows nothing about how litigation works in practice, nor is even aware of the existence of paralegals and litigation support managers and the critical roles they play in legal proceedings.

The Legal Profession and The Politics of Caseflow Management

Given this state of affairs within the legal profession one would not expect it to be particularly innovative or open to new approaches to caseflow management in the court system. Two reports dealing with litigation in the court system under the auspices of the legal profession bear this out.

In December 1995, the Advocates' Society, an association of litigation lawyers who are members of the Law Society of Upper Canada, released a task force report on civil litigation. In its introduction to the final report the Society explains the rationale for the task force and its mission. To quote:

> The central focus of the Civil Litigation Task Force of The Advocates Society had its genesis at a strategic planning meeting of the Board of Directors held in the Fall of 1993. As a result of that meeting, it was determined that the civil litigation process in Ontario was approaching, or in, a state of crisis given the length of time required for a litigant to obtain access to dispute resolution by way of trial.[45]

What the reader should focus on in this quotation is the closed system context it connotes in coming to what is essentially a matter that is public policy. It was the Board of

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[44] Alfred F. Conard, "Macrojustice: A Systematic Approach To Conflict Resolution," Georgia Law Review, Vol. 5, (Spring 1971), No. 3.

[45] The Advocates Society, Civil Litigation Task Force Final Report, (Toronto: The Advocates Society) at p. 1.

Directors, comprised solely of lawyers, who decided that the litigation process was in a state of crisis. What the task force report goes on to document is an evaluation of the nature and extent of the crisis with proposed solutions that are completely encompassed within the parameters of the legal profession.

Note the use of the word "crisis" as the descriptor of the state of litigation. This is the same word used as a descriptor for the state of the Ontario court system, which incorporates civil litigation, in the Ministry of the Attorney General of Ontario's 1976 "White Paper on Courts Administration - The Crisis Facing The Courts", which paper is discussed in detail in Chapter 4, The Politics of Caseflow Management.

The same professionals that raised a hue and cry about a crisis facing the Ontario justice system in 1976, and who proceeded to do little about it, were at it again in 1995, albeit under a different organizational umbrella. On the basis of the 1995 study, the Advocates Society task force developed a program for backlog reduction. The program would be spearheaded by a loose affiliation of backlog elimination committees that were adjuncts of local law associations who would look at the backlog problem in a local legal culture context on a regional basis.

Despite a mention in the terms of reference to the task force about access to justice being an issue of concern to the citizens of Ontario, The Advocates' Society takes the traditional insular professional approach when setting out the composition of the critical backlog elimination committees. They will consist of members of the legal profession and court administrators.

> A. Backlog Elimination Committees - It will not be possible to eliminate the backlog without a concerted effort on the part of the judiciary, courts administration and the Bar. For this reason, it is imperative that Backlog Elimination Committees be formed to put forward a co-operative effort in proposing a plan for the elimination of the backlog and in ongoing monitoring of the backlog to prevent recurrence.[46]

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[46] Ibid at p. 3.

This thesis argues that it is indeed possible to eliminate the backlog in the Ontario court system through the concerted efforts of a cast of actors that does not encompass just the bar and the judiciary. It is independent paralegals and court administrators working together, in an *ad hoc* symbiotic relationship that is very much marketplace driven, that has created responsive and cost-effective caseflow management in the provincial court system. If anything, this thesis demonstrates that the ongoing closed system cast of the judiciary, the bar and court administration, has hampered backlog elimination.

Not to be outdone by The Advocates' Society, the Canadian Bar Association commissioned a national study on the civil justice system and issued a Task Force Report in August 1996. Court delay and case backlog were two major areas analyzed by the task force. The report starts out with what looks like a new perspective on the trial delay / backlog problem.

> The civil justice system has been built upon procedural rules that accommodate the needs and convenience of lawyers, with less attention to the interests and concerns of clients, whom the system ought to be designed to serve.[47]

However, when one looks at the 53 recommendations for fixing the system, there is no inclusion of the public in the solving of the public's problems. All of the recommendations are focused on having lawyers, the judiciary, and to a lesser extent, court administrators retain their customary central positions in the justice system and to look to solutions which preserve the status quo.

This has been the essence of the politics within the legal profession for more than a century. It continues to be the case.

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[47] The Canadian Bar Association, Task Force on Systems of Civil Justice, Canadian Bar Association (1996) at p. 13.

Chapter Two

The Politics of Paralegalism

Introduction

The previous chapter on The Legal Profession as a Body Politic pointed out that, until the 19th century in Ontario, and indeed in North America, there were more similarities than differences between the self-regulated legal profession and non-lawyer providers of legal services, the early precursors of the modern day independent paralegal. An interlocking series of events set the course for the emergence of the practice of law as delivered through the legislated monopoly of the legal profession. By the early 20th century, the non-lawyer legal service provider had been relegated to the status of quasi-criminal interloper into the unauthorized practice of law. The descriptor quasi-criminal is used deliberately, particularly in an Ontario context. In Ontario the unauthorized practice of law (UPL) is subject to prosecution through the Provincial Offences Act in a Provincial Court trial.

This chapter will look at the evolution of legal services from the independent paralegal perspective. It complements the information provided to the reader in the previous chapter by adding a new dimension. It will provide the reader with an understanding of the concept of the independent paralegal and the politics that pervade the provision of independent paralegal services.

Paralegalism Defined

The paralegal is a paraprofessional. The term is a relatively new one that is still in its evolutionary stages in the legal profession.[1] The term paralegal was for all intents and purposes unknown in the profession of law prior to the 20th century. That doesn't mean to say that there was no such entity. Paralegals are as old as the profession of law.

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[1] American Bar Association Commission on Non-Lawyer Practice, Nonlawyer Activity in Law-Related Situations, 1995.

The descriptor "para" means to work beside. Until the latter part of the 19th century that is how one became skilled in the practice of law.[2] A young man (rarely a women) went to work in a law office as an indentured or articled clerk for an established lawyer. Initially, through working under the lawyer and eventually graduating to work alongside the lawyer, the articled clerk mastered what was then essentially the craft of practicing law. At an appropriate time, the articled clerk would be examined by the law society and if found to be fit, admitted to the profession as a practicing lawyer.

> Thoughtful lawyers gave cognizance to the importance of the principles of jurisprudence, the science of law, but they didn't think it was something every lawyer had to know. Thinking about the meaning of the law, going to school to learn how to think about it, was an honourable pursuit, but it did not a lawyer make.
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> The result was a system of education organized primarily around the worksite. Among historians of professional education, the value of apprenticeship has generally been viewed with suspicion or skepticism, and this is especially the case in law. Why this should be so is not clear. ... we reviewed the core tasks of the lawyer in some detail, and our student diaries reflect a thorough and systematic initiation into these tasks. Students learned in the office to do the paperwork of the profession by observation and imitation, then trying it on their own. They learned to work in the division and county courts. They travelled up to Toronto for terms, not just to observe the superior courts but to conduct some of their principal's business in those courts. As they matured they dealt with clients and conducted their own cases, under their principal's supervision.[3]

In the absence of a formal education and training system for independent paralegals in Ontario today, this 19th century model for lawyers is what suffices for them. Independent paralegals invariably acquire their expertise through some form of otherwise indentured training within the legal profession and justice system. For example, the great majority of independent paralegals who act as court agents on highway traffic offence matters have been trained as police constables and worked in traffic departments of local police forces. What they lack is the sort of professional review and accreditation board function provided by the Law Society of Upper Canada.

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[2] R.D. Gidney and W. J. P. Millar, Professional Gentlemen, University of Toronto Press, (1994) at p. 174.

In its natural derivative form paralegal does not denote a paraprofessional class that is in any way independent of or in conflict with lawyers and the legal profession. It connotes a person who is working very much within the legal profession. In the modern day legal profession the paralegal has been defined by the American Bar Association as follows:

> Paralegal (Legal Assistant) -- a person who, with supervision by and/or accountability to a lawyer performs specifically-delegated substantive legal work. Paralegals (legal assistants) are employed or retained by a lawyer, law office, governmental agency or other entity. The paralegal, also commonly and in this summary sometimes referred to as a "traditional paralegal", qualifies for the role through experience, education, training or any combination of the three. Qualification as a paralegal (legal assistant) permits the person to perform work that requires such knowledge of legal concepts that, absent the paralegal's presence, the lawyer would perform the work. A paralegal may also perform substantive legal work as permitted by administrative, statutory or court authority.[4]

In Canada, the term paralegal in this context is not commonly used. The operative descriptors are "legal assistant" and, in the Province of Ontario, "law clerk". The Province of Ontario is in a peculiar position in being the last remaining jurisdiction in the common law based countries to cling to the term "law clerk" to define a person working in a paraprofessional capacity. In England, where the term originated, it is now recognized that the label of law clerk is not a proper descriptor of a paraprofessional, one who works in a supportive rather than clerical reporting relationship to a lawyer. In the mother country of common law and the legal profession, the designation of "law clerk" was replaced by "legal executive" in 1963. Moreover, they are referred to as lawyers, a term with a long history as being associated with the provision of non-solicitor services in England. To quote from the Institute of Legal Executives, the industry sponsored self-regulating association since 1963, "legal executives are qualified, experienced lawyers specializing in a particular area of law. They have their own recognized status within the legal profession."[5]

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3 Ibid at p. 257.
4 See 1 at p. V.
5 Institute For Legal Executives, What is a Legal Executive, London: Institute For Legal Executives, 1996.

The American and English definitions illustrate what can only be described as a singular lack of consensus on what the nature of the paralegal function is. The legal executive, with its English Law Society approved label of lawyer, comes closest to the notion of paraprofessional. The American definition envisages more of a hierarchical reporting relationship and a status that is still based very much on clerical work. The Canadian concept is closer to the American.

What both labels and definitions have in common is that the paraprofessional, whether labelled as legal executive, legal assistant or paralegal, works under the ultimate supervision of a member of the regulated legal profession, a lawyer in Canada and the U.S. and a solicitor in England. They do not provide independent legal advice. Nor do they operate outside of the boundaries of the rules and regulations of a law society, although the American Bar Association recognizes what it labels as the legitimacy of the freelance paralegal. This is "a paralegal (legal assistant) who works as an independent contractor with supervision by and/or accountability to a lawyer."[6]

The independent paralegal is also as old as the profession. Indeed, one could arguably maintain that the independent paralegal preceded the profession. The preceding chapter indicates that, until the late 18th century, in England there was, for all intents and purposes, a disparate corps of unlicensed court agents and scriveners who plied their trade to the public. As Gidney and Millar note in their account of the practice of law in 19th century Ontario, the "laity", as independent paralegals were often labelled, constituted a solid core within the realm of legal service providers.

> For lawyers, the equivalent of unlicensed practice in medicine or dentistry was lay conveyancing, a term applied when non-lawyers earned income from drafting wills, deeds, mortgages, and other similar documents. Though a long-established practice in Upper Canada, it took even firmer root as commercial life quickened in the decades around mid-century. Small transactions involving land or commerce needed documentation, lawyers only slowly moved beyond the county towns, and laymen who could do the job were not only more accessible in the countryside but in town and country alike were willing to do it at cheaper rates. Lawyers

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[6] See 1 at p. V.

themselves often referred to it as "unlicensed practice"; but it was in fact perfectly legal for laymen to perform such tasks and charge fees for it.[7]

The Demise of the In-house Paralegal

The shift in emphasis from skill based legal training through articled clerkships, to professional education through universities created a void in the legal profession. There was a lack of available people with the requisite combination of skills and job responsibility to perform the technical functions associated with the practice of law.[8]

In theory this should have provided a natural opportunity for the creation of the paralegal. In practice it didn't, for one very obvious reason. Articled clerks earned nominal stipends for the privilege of acquiring their skills under the tutelage of established practitioners of the law. In fact, depending upon the locale and economic climate of the time, in some cases, articled clerks had to pay for the privilege of becoming indentured. In more cases than not, the system was a blatant example of labour market exploitation.

> At the end of the century, in any case, the evidence is more conclusive. At a meeting of the Osgoode Legal and Literary Society, one speaker remarked that articled clerks had, for all practical purposes, ceased to be useful, and he threw the blame on the Law School, which tied up so much of their time. Replied another, "practitioners were apt to look back to some 15 years ago, when the student was part of the office machine, and did a great deal of routine work, copying etc". Now the student was of little use in the office. This change would have taken place even if there had been no school, owing to the adoption of the principle of large firms with junior partners to do the specialized work of modern practice and to the introduction of the shorthand writer and typewriting machine. In the larger world beyond the confines of the professions, technology and the reorganization of the workplace were reducing the efficacy of apprenticeship and promoting the transfer of skill-training to schools of various kinds. Less could be learned in the shop; the production process undercut the role of the apprentice, and learning a craft became something that was more likely to happen in school. And so, perhaps, in the case of law. Though apprenticeship was not abandoned, its declining economic

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[7] See 2 at p. 256.

[8] Herbert M. Kritzer, First Thing We Do, Let's Replace All The Lawyers. (Unpublished Manuscript), 1995.

value encouraged those who had formerly opposed classroom learning to acquiesce in the new departure at Osgoode Hall.[9]

Consequently, lawyers had little incentive to rush out and create a new level of skilled labour for which they would have to start paying real wages. It was left to paralegalism to evolve through cracks which opened within the profession.

Several factors combined to produce these cracks. The first was largely self-induced by the legal profession in abandoning the skills field in favour of academic jurisprudence. In doing so the legal profession created a differentiated market for legal services. Since lawyers were more or less inclined to focus their time and attention on the "professional consultation or legal advice" segment of the market, there was the need for a skills based para-profession to enter the legal services craft marketplace.

However, just because lawyers had abandoned a skills based craft in favour of the learned profession of the practice of law did not mean they were prepared to relinquish ownership or control over its provision by another class of service providers. The professional services paradigm may have shifted but the political power of the legal profession over the practice of law in its widest parameters remained intact. Consequently, the provision of skills-based legal services by non-lawyer independent paralegals eager to fill a market niche void created by a departing professional group, became an issue of political conflict between a profession obsessed with protecting any and all of a political power base it had just recently acquired, and an ill-defined multitude of aspiring legal service providers.

The Legal Profession and the Politics of Suppression of the Paralegal

In an early perspective on the scope and dimension of this conflict and its politics, Duke University devoted an entire issue of its law review *Law and Contemporary Problems* to what it labelled "The Unauthorized Practice of Law Controversy". In the foreward to the 1938 special issue, editor Paul H. Sanders provided the following succinct summary of

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[9] See 2 at p. 375.

the complexities of the politics between lawyers and non-lawyers over the provision of legal services:

> The grant of exclusive privileges to a licensed profession necessarily involves the exclusion of the unlicensed from their exercise--and, with this, controversy as to the scope of the privileges granted. That problems of this nature should be a major concern of the legal profession today can be best explained, perhaps, by reference to the dynamic, constantly changing nature of legal business and, of course, this, in turn, is but a reflection of the historical and economic development of the institutions which the law serves. Matters which formerly constituted an important part of the lawyer's work have in some instances simply ceased to exist or, at least, to present legal problems. On the other hand, with the increasing complication in industrial and governmental functioning, new types of endeavour have been opened up, and, frequently, have been claimed by lawyers as their own. Still other lines of activity, formerly engaged in almost exclusively by lawyers, have been turned into profitable, specialized businesses by laymen. Under such circumstances, it was inevitable that controversy should develop between the legal profession and the lay groups which had "encroached" or which were seeking a foothold in the same new fields which the lawyers considered as falling within "the practice of law."
>
> The problem does not permit of easy solution. Those criteria which would be practically automatic in their application would not give satisfaction to any group. For instance, if "practice of law" is to be considered as synonymous with what lawyers do (and have done) then its scope is so broad that the multitude of "unauthorized practitioners" would be overwhelming. On the other hand, if the exclusive privileges of the lawyer are to be defined in terms of exclusiveness presently existing, then it would be difficult to find any general type of activity which the unlicensed person does not share with the lawyer to some extent. To the uninformed this whole matter might be regarded as of little concern to anyone except the controversialists, but when it is remembered that complaints are being made by the bar against such diverse groups as accountants, banks and trust companies, abstract and title companies, automobile clubs, insurance and other claim adjusters, collection agencies, notaries public, justices of the peace, real estate men, and undertakers, then it is clear that a large percentage of the public who will be affected either immediately or potentially feel apprehensive over the unauthorized practice situation.[10]

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[10] Paul H. Sanders, "The Unauthorized Practice of Law Controversy". (Foreward) Law and Contemporary Problems. (Winter 1938) at p. 1.

The quote raises a number of points pertinent to this thesis. In the first place, it illustrates that as late as 1938 in the U.S. there was still ambiguity within the legal profession as to what constituted the unauthorized practice of law. The situation had a similar dimension in Ontario, particularly in rural areas, where one stop service generalists acted as insurance agents, notaries and estate agents. In fact, the author commenced the practice of law in 1973 in a small, New Brunswick country town where up until that time there had been no resident lawyer. The local insurance agent acted as a commissioner of oaths and general purveyor of routine legal services such as drafting simple wills. The local certified general accountant (CGA) incorporated one person companies. The initial complaints about these practices emanated not from the public but from me as the licenced monopoly legal services provider.

This action brings up a second point referred to in the quote. The motive behind the complaint was pure and simple, turf protection for the legal profession. The end result was a clear unfettered market for me in which the prices charged for services reflected the professional guidelines presented by the law society.

On a large scale the turf war was between the bar associations, representing the legal profession and institutional bodies who were filling the gap. For example, the origin of the British Automobile and its compatriot American Automobile Association (AAA) and Canadian Automobile Association (CAA) was due to a legal service void in the legal profession in the early 20th century. The clubs began operations to provide members with free or low cost legal advice in the emerging fields of motor vehicle negligence law and highway traffic offences. Motor vehicle law had yet to take on the lucrative dimension that would make it attractive for litigation lawyers. The following excerpt from the Handbook of the British Automobile Association, circa 1930, outlines the nature and rationale for its legal services provided by an inhouse staff of lawyers and non-lawyers, the latter being equivalent of today's independent paralegal.

> LEGAL DEPARTMENT, FREE LEGAL DEFENCE: Free Legal Defence (by the Association's solicitors) is afforded (a) to every car member and owner-driver, (b) to every member who is the owner-driver

> of a cyclecar, and (c) to every motorcycle member in any proceedings under the Motor Car Act and Roads Act in courts of summary Jurisdiction in the United Kingdom.
>
> FREE LEGAL ADVICE: Every member of the Association is entitled to the advice of the Legal Department on any matter directly arising out of the use and ownership of motorcars or motorcycles.
>
> Disputes over buying and selling of cars, liability for accidents on the road, claims for damage in transit, responsibility of garage proprietors, queries on the Motor Car Act, and the various regulations governing registration, licensing, storage of petrol, etc., are only a few of the matters in which the Association is able to help members in any advisory capacity. It is frequently possible to assist in securing a satisfactory settlement of cases and avoid the expense and inconvenience of litigation.[11]

In an analysis of the legal controversy that erupted between the legal profession and the automobile associations over the provision of legal advice to its members by a non-profit organization, Professor Charles Collins put forward this succinct rationale for their position.

> The Motor Club Viewpoint - The services performed by the motor clubs in protecting the legal rights of their members are provided because the members have a right to, and demand, such services, and because such services are not obtainable except through a motor club.
>
> It is not now, nor was it ever the intention of the automobile clubs to engage in the legal business or to take away from the practising lawyer any business which he cared to handle or which he might profitably handle. As a matter of fact the reverse is true. The activities of the clubs in connection with cases involving unjust prosecutions have in many instances resulted in providing practicing lawyers with cases that otherwise would not have been litigated.[12]

This example is particularly germane to this thesis for a number of reasons. It provides a well documented saga of how left to their own devices the public is quite capable of developing legal mechanisms to look after their own interests in innovative ways that do not require the "protection of the public interest" under the monopoly of the legal

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[11] Charles Leviton, "Automobile Club Activities - The Problem From The Standpoint of the Bar," Law and Contemporary Problems, Vol. V, (Winter 1938), No. 1 p. 17.

profession. It also illustrates the degree to which the legal profession has been prepared to mark out its professional turf using its regulatory power as a blunt but effective instrument despite apparent public preference for alternative legal services. From the date of their inception independent paralegals made much the same argument to explain the legitimacy of their role and the degree to which they complement the legal profession overall and practising lawyers. Independent paralegals have emerged to meet the public demand for low cost legal services. Their arguments are not new. Nor is the response of the legal profession.

Edward B. Bulleit researched the response of the legal profession, and its all-out offensive to prohibit fraternal societies from providing low-cost legal services for minor motor vehicle law infractions, and offered the following opinion:

> Since 1931 a number of cases have arisen in which it has been charged that the automobile clubs in rendering these services engaged in the unauthorized practice of law. In all of the cases which have been brought to the courts of last resort--except in one instance--this charge has been sustained against the motor clubs. Usually no emphasis has been placed upon any particular type of service rendered by the clubs, but the courts have simply found that the practices as a whole constituted unauthorized practice of law.[13]
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> On behalf of the motor clubs it has been urged that most of the cases handled by them are small cases which would never be taken care of if the individual were forced to bear the entire burden of the litigation on his own shoulders, and that a plan whereby those with common interests join together for mutual protection and assertion of their rights is the only practical method of seeing justice done in this situation. Another theory of defense which the clubs have advanced is that taking the individual case is merely incidental to the fulfilling of the purpose of the club to protect and foster interests of motorists as a whole.[14]

Bulleit goes on to comment that the body of cases does not contain any understanding or empathy within the legal profession regardless of their jurisdiction, as to the plight of the driver with limited financial resources or the interests of the motoring public. The legal

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[12] Charles C. Collins, "Automobile Clubs Activities: The Problem From The Standpoint of the Clubs," Law and Contemporary Problems, Vol. V, (Winter 1938), No. 1 at p. 10.

[13] Edward B. Bulleit, "The Automobile Clubs and The Courts," Law and Contemporary Problems, (Winter 1938) at p. 22.

profession had been granted monopoly status over the practise of law and it was determined to prevent any type of encroachment on its protected market, a normal economic response, but certainly one considerably removed from a concern with protecting the public interest.

Attempts by non-lawyers, whether in the form of inhouse legal services staff or independent paralegals, to fill routine legal services gaps in the fields of simple wills and estates, real estate and mortgage conveyancing and so on met with the same response. The legal profession in Canada under the auspices of the Canadian Bar Association, and in the U.S. under the auspices of the American Bar Association, mounted aggressive attacks against any and all pretenders to the routine legal services provider throne even when they themselves had at best a marginal interest in the provision of that service.[15] If the legal profession didn't provide it, then the public was not going to get access to it through some other means, the profession made abundantly clear.

The source for this information, Professor Herbert M. Kritzer of the University of Wisconsin at Madison, has brought together material which represents arguably the most complete comparative analysis of independent paralegals in the U.S. and selected Canadian jurisdictions, notably Ontario. Kritzer demonstrates the degree to which law societies in Canada took their cue from the American Bar Association's UPL initiative and followed up with identical attacks on comparable situations in Canada.

When left to their own devices, provincial law societies and the Canadian Bar Association (CBA) have not proven to be particularly innovative or effective in their response to UPL. The POINTTS case was successful for independent paralegals at least in part due to the failure of the Law Society of Upper Canada to explore the full depth and dimension of the historical origin of the concept of agent in Ontario law. The Ianni Task Force commented on the inability of the LSUC to fully articulate the scope and dimension of UPL in Ontario from the perspective of protection of the public. The Canadian Bar Association of Ontario's (CBAO) response to the Ianni Report was so

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[14] See 12 at p. 10.

lacking in depth of analysis that the Ministry of the Attorney General requested the author to act as a facilitator between the legal profession and independent paralegals in 1998 in order to develop a working understanding knowledge of paralegals within the profession as a prcurser to government regulation.

The Legal Profession and Related Professions

In recognition of the political status of related professions, the legal profession took a different approach that led to professional standoffs between the legal profession and other professions that had an equivalent power status. It was in all the professions' interest to protect their self-regulatory monopolies. The legal and accountancy professions' practice areas contained a number of overlapping or grey areas. At what point did financial advice become predominantly legal advice, or legal advice become financial advice? These questions were never explored in detail by either the accounting or legal professions. That is not surprising because the source of the concern was not academic or theoretical but rather political. Here is Erwin H. Griswold, then Dean of the Harvard Law School, in a 1955 edition of The American Bar Association Unauthorized Practice News.

> The problem is often put in terms of "practice of law." Only lawyers can "practice law," it is said, and if what an accountant is doing is "practice of law", then he is acting improperly.
>
> I feel fairly sure myself that this is not a sound way to approach the problem. The trouble is that it really begs the question. If we start with that approach, then the conclusion is going to follow as surely as the night follows the day that much of what the accountants have long and customarily done is improper for them to do. The people who think in terms of "practising law"--and this includes many of those who have been active on unauthorized practice committees--proceed from that major premise to a minor premise that if the problem involves a matter of law, such as the application of a statute or regulation or court decision, then it is the "practice of law" and can only be done by a lawyer.

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[15] See 8 at p. 23.

> But this is surely too broad. Must all policemen be lawyers? They are surely involved in applying statues, and regulations, and court decisions. Their actions are not merely ministerial by any means. Must all city clerks be lawyers? Must the doctors in health departments all be lawyers, too? Must all legislators be lawyers? Obviously there are many things involving the law and its application which can and must be done by non-lawyers. The "practice of law" formula is not a safe and sound approach, it seems to me, if it is taken to include a rule that any matter involving application of statutes, regulations and court decisions can only be handled by a lawyer.
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> It would be my own view, for what it is worth, that this is the error into which the trial court has fallen, to some extent, in the well-known Agran case. The court has taken a too literal, or semantic, view of the concept of "practice of law", and has not recognized that there are many things that lawyers do do which are properly also done by others. The concept of "practice of law" cannot be as exclusive as it sounds when it is put in those terms. There is a very considerable overlap at the edges, and injustice is done if that overlap is not recognized.[16]

Griswald's conclusion is clear evidence that this well-respected scholar was having difficulty coming to terms with a clear and unambiguous definition of the practice of law. In fact, he suggests there is no definition as such when looked at from a client services perspective. However, this did and continues to make little difference with the legal profession. Its concern was and is the politics of the matter and the exercise of power of control of provision of services.

In this case the legal profession recognized that the overlap was with an accounting profession with arguably the same political status as itself. It was one self-regulated monopoly against another. The approach taken to resolve this problem was very much different than what was done with non-professional purveyors of legal services. A mutually beneficial line of demarcation was agreed upon between the professions. Rather than jeopardize either professional monopoly, the status of each was preserved.

In his address to the Taxation Section of the American Bar Association (ABA), Griswold explains to a group of lawyers very concerned with the perceived encroachment of

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[16] Erwin H. Griswold, "Lawyers and Accountants and Taxes," Unauthorized Practice News, No. 2, (1955) at p. 114.

accountants on their professional turf how the ABA was currently dealing with the issue. Note the conciliatory approach taken and the tone of reasonableness that pervades his remarks. The accountants are a recognized professional body in their own right and must be accommodated accordingly. Negotiation, rather than the confrontational style of prosecution under the umbrella of the unauthorized practice of law (UPL), which was the well-trodden route for dealing with perceived encroachments by non-professionals, is the preferred course of action.

> A significant proportion of the government's employees actually administering the tax laws are not lawyers. Some people may deplore this. Nevertheless, I suggest that it would not be wise for lawyers to seek to obtain any change in this respect. At the present time, the Treasury Regulations go far to protect the position of lawyers in the tax field. The organized accountants have been seeking a change in these regulations, or to obtain from Congress a change in the statute law which would affect the position of lawyers. So far they have not been successful. For a century and a half, the admission to the practice of law in this country has been in the control of the states, and that system has worked well. This deep-seated tradition is a powerful factor in favour of lawyers in the present situation. It seems to me likely, though, that Congress could prescribe the requirements of practice before the Treasury should they chose to exercise it. So they have left this to the states. I hope they continue to do so. But the surest way to lead Congress or the Treasury to exercise its power in this field, it seems to me, would be for the organized Bar to take an extreme or unreasonable position in the matter.
>
> The negotiations over the past year have been carried on by representatives of the American Institute of Accountants, which represents the certified public accountants.[17]

In this situation the legal profession's reasonableness is viewed in hindsight by many lawyers as their loss and the accounting profession's gain. By the 1980's the accounting profession dominated the tax consulting business. Lawyers have been relegated to secondary professional server status and marginalized to tax litigation.

One can argue that at least part of the rationale for lawyers being prepared to act in a conciliatory manner to related professions like accounting, when confronted with the

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[17] Ibid at p. 114.

prickly issue of demarcation lines of authorized practice, while being intransigent in their dealings with paralegals, is due to the opportunity factor. The related professions provide lawyers with opportunities for lateral expansion in their own work, while paralegals have traditionally been seen as interlopers with no mutually beneficial opportunity to offer lawyers. They are out and out encroachers rather than uninvited guests bearing what might well be gifts.

Professor John Quinn of the Faculty of Law at the University of Western Ontario explored this matter in a working paper for Ontario's Professional Organizations Committee in 1978-79. His research indicates that legal profession regulatory bodies in Canada and the U.S., while being proprietary in their reserving the practice of law for lawyers, have created a playing field which permits lawyers to collaborate with related professional services providers when it suits their professional interests. He begins with the bar position which defines the parameters for the practice of law.

> The Law Society of Upper Canada has sought to police professional independence by prohibiting forms of practice which may subject the lawyer-client relationship to the control of non-lawyers. The Law Society Act bans the practice of law by a professional corporation to ensure that non-lawyers, either as shareholders or directors, cannot obtain the right to direct or control lawyer-client relations. The American Bar Association authorizes corporate practice, but requires that share ownership be limited to lawyers. The Law Society's rule against sharing fees with unlicensed persons is also designed to insulate lawyers from lay third-party control. It prevents lawyers from accepting employment with any organization offering legal services to the public which is owned, either wholly or partially, by non-lawyers. The effect of these rules designed to protect professional independence is to preclude any form of multi-disciplinary practice, through either a corporation or partnership, involving ownership by another group of broader ethical rules aims at the promotion of professional independence by prohibiting the performance of occupational roles incompatible with the practice of law because they may create conflicts of interest. The Canadian Bar Association's Code provides that a lawyer who engages in another profession or occupation "... concurrently with the practice of law must not allow such outside interest to jeopardize his professional independence." Regulations promulgated by the General Council of the Quebec Bar prohibit advocates from engaging in the

> concurrent practice of any "... trade or other profession governed by statute" and from the "... operation of any commerce or industry."[18]

This is official bar association and law society dogma on the practice of law. It was formulated in the late nineteenth and early twentieth centuries when the major concern of the legal profession was to build strong professional barriers to exclude all but those who were clearly lawyers by profession. It was crafted during the era of encroachments on the profession by interlopers such as auto clubs, banks and trust companies. The purpose was to stop any and all backdoor attempts to practice law.

It was successful. However, it was also unduly restrictive in that it prohibited lawyers from expanding their service base into naturally affinitive fields of services. In an effort to rectify this deficiency Quinn indicates how professional regulatory bodies provided for expansion when it was in the legal profession's interest.

> The Law Society of Upper Canada has not adopted any specific ban on the performance of incompatible functions, nor has it formulated any general principles governing the concurrent practice of other professions or occupations. The Law Society has, however, adopted specific rules concerning lawyers who engage in such activities as financial management or mortgage brokering as adjuncts to their professional work. For example, Ruling 15 does not prohibit a lawyer from acting as a mortgage broker, but it does provide that:
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> > "It is improper for a lawyer acting for the person introduced by him to a mortgage company, ... to accept a finder's fee unless (i) he makes full disclosures to his client, and (ii) pays the fee over to the client or credits the same against his account to the client."[19]

Lawyers can act for clients in complementary professional capacities as long as they clearly indicate to the client that they are doing so and do not double bill the client for doing so. This compromise position has had a less than satisfactory professional services outcome. The inordinate emphasis on preventing a conflict of interest between the

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[18] John Quinn, Multi-disciplinary Services: Organizational Innovation in Professional Services Markets. Working paper for the Reort of the Professional Organization's Committee (1980) at p. 27.

[19] John Quinn, Multi-disciplinary Services: Organizational Innovation in Professional Services Markets, Working Paper for the Report of the Professional Organization's Committee (1980) at p. 27.

lawyer and the client makes the proposition a less than attractive position from a financial perspective.

Conflict of interest is also very narrowly construed reflecting the initial emphasis on exacting and maintaining rigid professional barriers. Quinn goes on to point out what is missing in this approach.

> It should be emphasized that conflicts of interest arising from a lawyer's performance of certain occupational functions (e.g., real estate agent, insurance agent, etc.) create particularized or fact-specific ethical objections to multi-disciplinary practice. Many forms of multi-disciplinary practice in which lawyers might be expected to participate (e.g., law and accountancy or law and engineering) create no unusual risk of conflicts which may impair a lawyer's independent judgement. Moreover, it should be noted that the ethical rules of neither the Canadian Bar Association nor the Law Society generally prohibit a lawyer from accepting employment or continuing to act in circumstances in which a conflict of interest affecting his client may exist. They only require that the lawyer obtain his client's consent to the existing or potential conflict, after providing the client with a full explanation of the facts giving rise to the conflict.[20]

Quinn is correct in pointing out that ethical rules of practice are fact or service specific. In other words they prohibit lawyers from taking on the dual role of lawyer and consultant. However, what Quinn does not fully explore is the degree to which the legal profession has expanded fact and service specific restrictions to generalizations. The LSUC, for example, has interpreted the fact specific prohibition in such a manner that lawyers who engage in mediation are required to disqualify themselves as lawyers for the purpose of drafting documents such as separation agreements and uncontested divorces. There are no such restrictions on non-lawyer mediators. They can mediate and then draft consensual separation agreements. The LSUC has interpreted what its lawyers do as case specific mediation but what mediators do as UPL because of their broader service range. The LSUC has begun prosecuting full service mediators as independent paralegals engaged in UPL.

In doing so the LSUC has lost sight of the forest for the trees. It is attempting to force fit mediation into the jurisprudential paradigm. The reason the public has moved to mediation is that they want a service with multi-disciplinary capability. The LSUC should be modifying its ethical practice and responding to the public interest in mediation rather than endeavouring to force-fit the public into guild inspired rules of professional conduct.

This suggestion is not without precedent. The legal profession has proven adept in the past in working out mutually beneficial professional practice lines of demarcation.

Barlow F. Christensen of the American Bar Foundation undertook a thorough study of the various approaches taken by the legal profession to prohibit or contain the unauthorized practice of law. He provides the following fascinating account of how over a 25-year period the legal profession negotiated mutually beneficial professional services monopoly agreements with institutions that had the power to force a reckoning rather than engage in a turf war.

> One other development of this period deserves attention. Local and state bar associations began very early to negotiate with representatives of other professions and businesses to secure agreements about activities deemed by the bar to be the practice of law. Thus, as far back as 1925, the New Haven Corporate Fiduciaries' Association adopted Rules of Policy specifying in detail the rules of conduct that would enable corporate fiduciaries to avoid unauthorized practice in the drafting of wills and in the providing of other legal services. By 1934, such statements of policy had been adopted by corporate fiduciaries' groups in 14 cities and nine states, and the title companies in one city had adopted a similar statement. In 1933 the trust division of the American Bankers' Association also adopted a statement of principles that declared ". . . that trust institutions should not engage in the practice of law."[21]

It is noteworthy that various paraprofessional associations, most notably the Paralegal Society of Ontario (PSO), have from time to time expressed a willingness to enter into these sorts of agreements. The LSUC has remained steadfast in its refusal to entertain

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[20] Ibed at p.27.
[21] Idid at p.196.

what on the surface would appear to be a mutually beneficial service demarcation agreement. Christensen goes on to explain why this is so by pointing out why bar associations and law societies were prepared to be conciliatory to trust institutions and the like.

> An important part of the unauthorized practice effort of the American Bar Association during the years following was the negotiation of such agreements with various business and professional groups at the national level. By 1958 statements of principles had been adopted by the national organizations of accountants, banks, collection agencies, insurance adjusters, life insurance underwriters, publishers, and realtors. These statements served not only to help the members of other businesses and professions to avoid encroachment upon law practice, but they also provided statements that the courts could use in deciding cases before them, without the necessity of making hard decisions about what was or was not the practice of law.
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> While the bar took great pride in these statements, formulated as a result of "cooperative" efforts with other businesses and professions, the agreements seem in retrospect really to have been simply instances of discretion being the better part of valor on the part of the other parties to the agreements. The banks and trust companies, for instance, had an interest in preserving the good will of the legal profession; lawyers, as drafters of wills and trust agreements, have much to say about who will be designated executors and trustees. To the leaders of most other professions, the giving up of the right to perform some incidental functions was probably seen as a modest price to pay for the avoidance of harassment and attack by the bar, which clearly had the courts on its side. Whatever the reasons, however, the success of the legal profession in securing these agreements seems to have had a significant influence on the activities of many who might otherwise have engaged in the unauthorized practice of law.[22]

One can speculate that at least one of these reasons is the symbiotic relationship that has existed between lawyers and the courts, the latter having the legal power to enforce UPL. Refer to chapter 1 and the explanation of how lawyers and judges in the common law system, augmented by professional legal education, have evolved into one professional group that performs two related functions. The lawyers have the ear of the judges, who

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[22] Barlow F. Christensen, "The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors - Even Good Sense?" in American Bar Foundation Research Journal, (1980:159) at p. 196.

were former practitioners in their own right. One takes on the legal profession in the justice system at considerable peril.

The Politics of Paralegal Suppression

The legal profession has also made a concerted uniform effort to leverage its legalese into the politics arena. In Canada and the U.S., a succession of provincial law societies and state bar associations were successful in having self-regulatory professional statutes passed which granted them monopoly status over the practice of law and the exclusive right to license learned professionals to hold themselves out as practising attorneys and barristers.[23] Neither the practice of law nor the terms of reference for an attorney or barrister were actually spelled out in the legislation. State bar associations then encouraged empathetic judges in court proceedings to make rulings that expanded the definition of what constituted the practice of law.[24] In Canada, provincial law societies picked up on these American precedents and incorporated them into their regulatory compliance framework.

By the 1930s the legal profession had effectively lobbied legislatures and courts to define the practice of law as everything that state bar associations and provincial law societies deemed it to be unless a person or organization could prove otherwise. The extent to which the legal profession went to make its case and deter others from encroaching on its turf is extreme, as illustrated by a 1937 U.S. publication called *Brand's Unauthorized Practice Discussions*.[25] It was an 838-page tome listing the hundreds of instances in which hapless purveyors of information and drafters of documents were found to be engaged in the unauthorized practice of law (UPL), often much to the accused parties' chagrin and/or surprise. In many cases, the unauthorized service providers were delivering services which in an earlier era would have been relegated to lowly paid articling clerks who were no longer available through law firms at a reasonable cost.

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[23] See Chapters 1 and 2.
[24] See Chapters 1 and 2.
[25] Ibid 8 at p. 19.

The ABA in the U.S., and provincial law societies in Canada, were well-oiled political machines that aggressively sought out any potential threat to their professional monopoly by independent paralegals. They showed no mercy in devoting substantial financial and professional resources to eradicating alternative legal service providers. Herbert Kritzer provides a fascinating account of the level and extent of the UPL campaign.

> We can turn back to the national picture to see how the bar enforced the restrictions it obtained. Most state bars established committees on unauthorized practice. These committees collected reports and initiated legal action. Through the middle of the century (1934 to 1977), the ABA's Special Committee on the Unauthorized Practice of the Law published a newsletter, *Unauthorized Practice News*, which kept the various state committees informed of developments around the country.
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> As of 1979, state bars continued to actively enforce unauthorized practice rules. She found that such enforcement was alive and well. The California Bar's Unauthorized Practice department handled 201 complaints that year. Nationally, enforcement officials handled between 1,600 and 2,000 complaints, investigations, or inquires. During the period from 1970 to 1980, there were 84 reported cases. Few bar officials were willing to state that unauthorized practice actually threatened lawyers (only 3 of 41 respondents to a survey conducted by Deborah Rhode) while most (23 of 39) asserted that such practice posed a threat to the public. In fact, few of the complaints received by officials came from the consuming public or involved injury to that public; of 1,188 complaints and inquires, only 27 came from or directly involved the consuming public. Of the 84 reported cases referred to previously, only 9 (11%) involved allegation of injury to clients, and four of those involved individuals who falsely claimed to their clients that they were attorneys.[26]

Professor Kritzer's summary of these findings has been further developed and elaborated on by Professor Deborah Rhode of Stanford University.[27] She found that over a 50-year period, well in excess of 90% of the actions brought in state courts across the U.S. to prosecute independent paralegals for UPL in order to protect the public interest were initiated by lawyers who essentially argued against the threat of unregulated price competition. Closer to home the Ontario Task Force on Paralegals came to the following conclusion:

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[26] See 8 at p. 19.

[27] Deborah L. Rhode, "Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibition," Stanford Law Review, Vol. 34, (November 1981) at p. 1-112.

> Examination of 155 open files of the Law Society dealing with unauthorized practice reveals some clear trends. A great preponderance of complaints were made by lawyers rather than consumers. Even if we recognize that an unsatisfied client of an independent paralegal may have subsequently sought the services of a lawyer who then registered a complaint with the Law Society, we have found that in the roughly three-year period (1986 to 1988) during which complaints were made only 13% of them were initiated by clients of independent paralegals. On the other hand, 87% were initiated from among lawyers, governmental agencies or the Law Society itself.[28]

The Paralegal Void

One might wonder why bar associations and law societies were so occupied with stamping out UPL. Why was there an 838 page book of UPL cases? This thesis will argue that regulatory bodies were busy because there was a market for paraprofessional legal services that was being ignored by the legal profession. Just because the legal profession abandoned paraprofessional-level work did not mean the services would disappear.

This still left a need for a number of clerk level jobs to be performed within the practice of law. In demonstrating professional resistance to having this work performed outside of the profession, lawyers by default, and unwittingly, were left with the responsibility of having legal work performed under their supervision that was not, strictly speaking, at the professional level. Unfortunately, since lawyers had moved upstream and abandoned these tasks, they initially lost interest and ultimately the ability to provide first class direction and supervision over development and delivery of skill-based craft services.

In the U.S., the upstream movement by lawyers and the downstream abandonment of former craft services was total with the elimination of the articled clerkship. In Canada, a facade has been maintained which requires law school graduates to work under the supervision of a practising lawyer as an articled clerk for a period of time. However,

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[28] R. W. Ianni, Commissioner, Task Force on Paralegals, Ontario Ministry of the Attorney General (1990) at p. 27.

articles of clerkship have become synonymous with practising law at a junior associate level, as opposed to mastering a craft and paraprofessional skills.

This state of affairs has assumed an almost ludicrous proportion in the modern day full-service law firm. Legal assistants/paralegals are often required to explain to newly minted law graduates hired as junior associates, who they are, what their role is, and how they differ from legal secretaries. They must take on the task of teaching the new associate many of the craft-like legal skills that they are supposed to be performing under the supervision of a lawyer.

It is interesting and important to note for comparative purposes that the creation of a differentiated market for legal services and the segmentation of labour into professional and paraprofessional categories has not always been a process that is equated with abandonment and de-skilling at the paraprofessional end of the spectrum. Britain has a well established history of creating a well planned and strongly supported para-profession of barristers' clerks and solicitors' legal executives (paralegals). One can speculate that at least part of the reason for the more rational planned approach in Britain has been that lawyers had been conditioned to market differentiation and segmentation of services and how to recognize value in them through the distinction between barristers and solicitors at the main professional level.

In modern day Britain a person can sign on as a legal executive in training and through a combination of on the job training and continuing education become a true paraprofessional legal executive.[29] A fully qualified legal executive does work alongside a solicitor and performs skills-based tasks that resemble the work a junior associate lawyer does in Canadian and American law firms.

In his introduction to *Thatcher, Reagan and Mulroney*, Donald J. Savoie observes that "it was Thatcher's 1979 election victory that had signaled a break with the past."[30] That break with the past extended beyond a mere managerial reorganization of the public

[29] Institute For Legal Executives, What is a Legal Executive, (Institute For Legal Executives, 1996).

service. "She brought to office ideologically driven programs of privatization, deregulation, contracting out and trade union reform." [31]

One of the areas that Prime Minister Thatcher set out to deregulate was the legal profession. Early on she zeroed in on real estate conveyancing, a traditional bread-and-butter practice niche for English solicitors and Canadian lawyers. A multi-stakeholder conveyancing committee was set up with a mandate to survey the status of conveyancing.[32] In its investigation it looked into the competencies of legal executives. It found their formal training to be first rate. It noted that "as is well known, unadmitted staff working in solicitors' offices undertake a considerable amount of conveyancing work including the preparation of draft contracts, and it would obviously be undesirable if any extension of the restrictions to take in the contract stage put unadmitted staff outside the law in respect of a large proportion of their current work."[33] This is true paraprofessional level work.

Britain will move even further along the road to the rationalization of the legal profession in 1999. The Lord Chancellor's Department issued a white paper in June 1998 outlining its intention to create a uniform system of legal training. It will allow persons to start their legal education in either the legal executive or solicitor stream. Legal executives will be able to transfer their paraprofessional training to the solicitor qualification program and eventually qualify as solicitors. This is almost a back-to-the-future application combining the basic framework of law clerk training from the nineteenth century with university legal education of the twentieth century. It will also create unification on the basis of compatible lines of demarcation between solicitors (lawyers) and legal executives (paralegals) in England.[34]

This is not what has happened in the U.S. and Canada. A hodge podge of developments have taken place: in some cases legal secretaries took on executive assistant roles and

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30 Donald J Savoie, Thatcher, Regan, Mulroney, In Search of a New Bureaucracy, University of Pittsburgh Press (1994) at 9.

31 Ibid at p. 9.

32 The First Report of the Conveyancing Committee: Non-solicitor Conveyancers - Competence and Consumer Protection, (September 1984). London: Her Majesty's Stationery Office.

33 Ibid at p. 7.

filled the clerk void. In other situations paraprofessionals were hired under a variety of labels such as legal assistants, law clerks and paralegals. The proliferation of labels speaks more to the confusion and lack of consensus within the legal profession as to what the nature and function of the paraprofessional was, rather than any rational definition of what type of work they should be doing and how they should be doing it. For a profession that had paid so much time and attention to creating professional parameters for the legal profession and convincing legislators of the merits of restricting the practice of law to it, there has been a total lack of professionalism displayed in developing the paraprofessional. Unlike other professions such as accountancy, architecture, dentistry, medicine and optometry, where there are certifiable standards and rational lines of demarcation between professionals and paraprofessionals, the legal profession has taken no substantive action in this regard since the turn of the century. Any member of the public can label him or herself as a legal assistant/paralegal, and law firms are free to make paraprofessional designations to fit the tenor of the times and circumstances.

This is no small matter of concern, not just to the legal profession, but to the public in whose best interests lawyers are supposedly acting. There can be no argument with the position that a key consideration for acting in the public interest is the provision of value-added services in a cost effective manner. This means apportioning work on a skills basis that reflects the actual core competencies required to perform the requisite task or function at hand. The legal profession's failure to act responsibly in the matter of the paralegal has created a service problem for the public. It has resulted in too broad a level of service responsibility being left in the hands of lawyers.

Even if lawyers had attempted to maintain a unified market for legal services, it would have been necessary to bring in people with special skill to share the workload. Unfortunately, lawyers have not been particularly adroit or skilful in apportioning the work on a skills basis that reflects the true complexity or nature and scope of the task or the core competencies of the legal service provider. Work apportionment has been rationalized by lawyers on the basis of "this is what I like to do, or can generate the most

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[34] Lord Chancellor's Department. Rights of Audience and Rights to Conduct Litigation in England and Wales, The Way Ahead. June 1998.

profit from doing, and so I'll do it; and this is what I don't like to do, so I'll pass it down the line".

The result has tended to be task differentiation that reflects the value lawyers place on the quantity and quality of their time spent rather than what might truly reflect client needs and preferences. In reality, this has translated into a workplace situation whereby the "para" in paralegal has less to do with working along with or beside the lawyer, as is very much the case in the British system, and more often than not with the performance of inferior tasks. The paralegal works very much under the lawyer in all respects rather than with the lawyer subject to legal supervision.

This has created a service imbalance. It has been estimated that as much as 40% of the work in law firms in both Canada and the U.S. can be done by properly trained executive-level legal assistants/paralegals. Only 60% of the work actually requires the direct professional involvement of a lawyer. Unfortunately 90% of the work in law firms is still being done by a hierarchy of lawyers who are overpricing their services through a cascading pyramid of partners, associates and articled clerks. David Maister, a leading consultant in the legal services field offers the following advice to law firms:

> In numerous (anonymous) surveys I have conducted inside professional firms, I have been consistently surprised at how high a proportion of their personal work professionals at all levels report could be done by more junior staff. (Firm wide averages sometimes exceed 30 or 40 percent.) Even allowing for some client preferences to deal with high level professionals, these results show that many practice groups continue to maintain expertise-based approaches (services defined by professional designation) to running their affairs when their marketplace is probably closer to the efficiency (services defined by client service requirements) stage.[35]

The refusal of the legal profession to deal with the paraprofessional factor, along with the failure of law firms to allocate work on the basis of a professional/paraprofessional continuum that reflects core competencies rather than professional status, has reached

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[35] David H. Maiste, Managing the Professional Service Firm, Free Press (1993) at p. 30.

what is arguably a point of no return with the emergence of the information age. Law firms are caught in a web of narrowly defined law practice. Other professional service providers have begun to converge on the law firm market, in some cases pushing at the edges, and in other cases, such as with some independent paralegals, challenging UPL doctrine with cost-effective professional service alternatives supported by the general public.

In a more recent book, which is essentially an updated report on his ongoing consulting and research into accounting, consulting and law firms, Maister argues that the accountancy/consulting firms have now established a firm beach-head in the legal services field.

> Consulting and accounting firms advise companies on acquisitions, sales joint ventures, initial public offerings, and a whole host of other big-ticket, complex deals. There is no business reason why they couldn't (and shouldn't) build an integrated legal component into their services in these areas, providing a soup-to-nuts service and eradicating the need for the outside law firms entirely. In fact, it's fairly obvious that -- where regulations allow -- the accounting firms are well on their way to doing just that.[36]

Price Waterhouse now has 300 lawyers on staff in its European consulting group and has recently taken a Washington D.C. law firm under its umbrella in what is being viewed as a test case for American multi-disciplinary practice. Ernst and Young is developing an inhouse global taxation law firm with 85 lawyers headquartered in France and a newly established Toronto-based Canadian inhouse law practice taxation unit. In England, Andersen Consulting has formed the genesis of a multi-disciplinary practice with Garrett and Co., London's largest firm of solicitors.[37]

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[36] David H. Maister, True Professionalism: The Courage to Care about Your People, Your Clients and Your Career. Free Press, (1997) at p. 500.

[37] David Rubenstein, "How The Big Six Firms are Practicing Law in Europe," Corporate Legal Times, (November 1997), Vol. 7, No. 72.

Paralegals and the Paradigm Shift

Every professional, including lawyers, now must make use of information technologies in order to meet the service demands of the current client marketplace. The technology factor is also forcing paralegals to go through a major series of adjustments in their own right. Public policy analysts like Thomas Courchene and Robert Reich are in unison in seeing technology as heralding an information age and new economy in which the paraprofessional/technologist has been thrust into a status previously reserved for the professional and managerial classes.

A knowledge-based society has created knowledge-based workers who have acquired their knowledge base from information sources that extend beyond the traditional parameters of the law school. Professor Harry Arthurs of Osgoode Hall Law School paints the following profile of the new legal service profession:

> For example, lawyers who perform routine services for lower and middle class clients have spent, typically, seven or eight years of post-secondary education and training before entering practice. This is an excessive investment in intellectual capital, which many will never be able to amortize without charging fees which the market will no longer bear. On the other hand, in many areas paraprofessionals can (and do) perform most of the routine work over which fully qualified lawyers claim an exclusive monopoly. We should therefore seriously consider two complementary measures: reducing the education and training qualifications required of lawyers who wish to practise exclusively in these areas, and extending right to practise to both qualified lawyers and trained paraprofessionals.[38]

Many services that were once considered to be custom based have been transformed into commodities. Real estate work no longer requires a painstaking title search and the manual preparation of documents. Computerized abstract services and real estate and mortgage software packages now have eliminated the need for any direct lawyer involvement in the great majority of real estate transfers and have now made this a commodity service where cost effectiveness in service design and delivery are now the

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[38] H. W. Arthurs, "Changing World - Challenging Times: Lawyering in Canada in the 21st Century," Background Studies to the Systems of Civil Justice Task Force Report, Canadian Bar Association (1996) at p. 23.

dominant factors in the process. In litigation much of the documentation and case management work can now be administered through computerized software.[39] Litigation support management is emerging as a technologist/paralegal performance based service and is redefining and narrowing the professional dimension of the work that needs to be done by a lawyer.

Value is now being derived from the ability to use information technology to provide traditional services less expensively through leveraging by technologists or massaging the information in innovative ways to satisfy market niches of legal needs. Professional status in its own right is no longer an indicator of the potential or ability to create value. Lawyers, with their long standing entrenched association with jurisprudence, are having difficulty coming to terms with what is in effect a new paradigm of legal services. Alternative service providers are emerging to fill this void in the marketplace of legal services. These alternative service providers represent a whole new breed of paraprofessionals. As Christine Hart, former Project Director of the Ontario Court (General Division) ADR Centre, has said:

> What qualifications should the neutrals have? There is no accepted qualification for non-family mediators in North America. Research shows that a law degree is not a predictor of mediator competence. American courts which originally required law degrees from their mediators are moving away from that requirement. In an evaluator, the expertise required is subject matter expertise. In a mediator, the primary expertise is process expertise.[40]

Law firms should be in the best position to capitalize on these opportunities. In light of their failure to develop first rate paraprofessional capability, they are not. Ironically, accounting/management consulting firms are taking the lead in developing profitable service niches in areas such as litigation support management. In fact, Christine Hart, a lawyer, was at the time of this quote managing the ADR function for a national management consulting firm.

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[39] Pamela A. Callow, "Technological Change as a Revolutionizer of the Civil Justice System," Background Studies of Civil Justice Task Force Report, Canadian Bar Association, 1996.

[40] Christine E. Hart, "Role of ADR In the Civil Litigation Process Emerging Issues," in Background Studies to the Systems of Civil Justice Task Force Report, Canadian Bar Association (1996) at p. 8.

The 1996 American Bar Association annual conference brought home this point. Ward Bower and Gray Garnett of a U.S.-based law firm consultant, Altman Weil Pensa, delivered back-to-back keynote addresses which highlight the new sources of competition for litigation lawyers and the reason for the success of new professional services providers *vis-à-vis* law firms. First Ward Bower on the competitive advantage of accounting firms:

> Large Accounting firms are very highly leveraged and find means by which legions of non-CPA employees (paraprofessionals) can generate profits for the owners.[41]

Next, a comment from Garnett:

> Profiling The New Competitors - The major long term competitors to larger private law firms are the Big Six accounting firms who are well financed and committed to an extended run at the market. Another competitive factor to consider is the recent emergence of litigation boutique law firms promoting high-level experience based, efficient, and cost effective services. This trend, which is quite pervasive, reflects the profession's own doubts about the relationship of law firm size and the most efficient organizational structure to deliver litigation services.
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> Consultancies are also becoming more sophisticated. Firms such as LTI (Legal Technologies Inc.), Peterson Consulting, FTI, DecisionQuest and others are providing services that potentially erode major law firms directly or indirectly.
>
> A number of low end providers, using technology to their advantage, are encroaching on the traditional leverage in litigation. Legal research services and legal assistant clinics are systematically providing services traditionally carried out by associates in larger firms. Accounting firms, consultancies and temporary agencies are currently funding subsidiary operations in the legal research area, joining already existing legal research networks made up of academics and part-time lawyers servicing clients on-line.[42]

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41 Ward Bower, "New Competitive Threats For Law Firms," Allman Weil Pensa Report to Legal Management, Vol. 21, No. 7, (April 1995) at p. 8.

42 Gary R. Garrett, Ph.D. and Ward Bower, "A Competitive Analysis of the Complex Litigation Services Market: Implications for Larger Law Firms," A White Paper for Review and Discussion, Altman Weil Pensa (1995) at p. 6 - 8.

There is an important caveat to consider with respect to paralegals in conjunction with this third development. The traditional paralegal who operated at a low skills level is also being threatened with the new information technology in two fundamental ways.

The typewriter and offset printing enabled lawyers to eliminate the drafting skill from their craft and changed it from a skills-based craft to a mass produced commodity for many standard legal documents. The new generation of computerized software is enabling traditional low level legal support services work to be mechanized, threatening the traditional paralegal. The contemporary paralegal must evolve from document processor and low level researcher to knowledge based worker.

In addition, many traditional paralegals do not have the skills capability, at least at present, to access and make the best of the latest generation of information technology. They are low level skills workers. Consequently, paralegals are struggling to redefine and reposition themselves upstream within the new marketplace for legal services.

The Independent Paralegal

Information technology and the information age have precipitated a fundamental paradigm shift in the marketplace for legal services. Better informed clients, no longer awed by professional service providers, are interested in exploring alternative methods of service. They have been conditioned to believe in the merits of seeking out new and innovative services and alternative service providers. Their searches are market driven and price sensitive in a sophisticated sense. They are looking for the potential to obtain the most value for the money spent. The value added factor becomes the principal motivator in their search for service and selection of a service provider. Independent paralegals have proven to be adept value added service providers.

Not surprisingly, this has created a desire among paralegals to assume a status that reflects their new stature as members in good standing and repute of the professional and managerial classes. As recently as 1980, *The Report of the Professional Organizations*

Committee to the Attorney General for the Province of Ontario was confident in recommending that there was general agreement in the legal services field that there was no need for the establishment of a licensure system for independent paralegals.

> With the information at our disposal, we are not inclined to recommend that conveyancing, or any other class of so-called "routine" services, should be "carved out" of the existing licensure regime in law and opened up to other service providers. We take this view for a number of reasons: first, to take such a course would necessitate the creation of a new occupation or new occupations to provide these services, presumably under licensure regimes of their own. This would require government involvement in the development of appropriate education and training programmes, and regulatory structures. Such a major enterprise would not seem worth undertaking in the absence of a very compelling demonstration of substantial net benefits therefrom. Second, to follow this course would substantially increase the prospects of the kind of demarcation disputes among licensed professions or occupations that have plagued other professions. Third, there is real difficulty associated with identifying and defining exactly what services are, or are not, routine. In the case of residential conveyancing, some conveyances may in fact be straightforward and could be processed by persons lacking the full training and skills of a qualified lawyer; on the other hand, other residential conveyances may involve complexities the equal of those that are sometimes encountered in much larger commercial transactions. Thus, matching tasks to skills in any exact way is impossible, and an element of arbitrariness and approximation is inevitable no matter how a licensure regime is structured. Fourth, the substantial influx of new lawyers into the profession that has been occurring in the province of Ontario over recent years, with about a thousand new lawyers being added to the profession annually, alleviates concerns over undue restrictions on the supply of legal services. Fifth, to the extent that fee levels are unnecessarily high in some of the more routine service areas at present, we would hope that recommendations which we have made elsewhere in this Report on matters such as price advertising would, over time, significantly ameliorate these conditions. Sixth, our recommendation to the effect that the Attorney General's consent should be required for the initiation of any prosecution for unauthorized practice in law provides some potential for continuous marginal adjustments in the way the licensure regime will apply to the activities of non-lawyer providers in the legal services market.[43]

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[43] The Report of The Professional Organizations Committee, Ministry of the Attorney General For Ontario (1980) at p. 73.

However, a mere ten years later in the new economy, the legal services paradigm had shifted. *The Report to The Task Force on Paralegals* (the Ianni Report) reported the following:

> That was ten years ago. But much has changed in the market for legal services in the intervening decade. At the time of the Report of the Professional Organizations Committee, independent paralegal activity in Ontario was minimal. Now, however, independent paralegals constitute a significant part of Ontario's legal services market.[44]

The Ianni Report found that independent paralegals were a considerably different breed of paraprofessionals than that which was described ten years earlier. They possessed a wide variety of skills, which in the cases of some financial and advocacy services providers, were on par with the professional skills of lawyers. In other instances, their skills were more directly community based. They were grass roots street workers, advocates for special interest groups, or representatives for non-mainstream cultural groups, such as first generation immigrants and refugees.

The Ianni Report defined them on the basis of their disassociation rather than association with lawyers as follows:

> For the purpose of this study the Task Force has defined a paralegal as one who:
> 1. is not a member of the Law Society of Upper Canada;
> 2. offers a particular type of legal services to the public for a fee; and
> 3. is not supervised by a qualified legal practitioner.[45]

Overall, the Ianni Report made a strong recommendation for the creation of a new class of paraprofessional, the independent paralegal, to provide routine legal services directly to the public.

The Ianni Report is now eight years old. Two successive governments have made sporadic efforts to use it as a mechanism to revisit the monopoly over the practice of law

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[44] See 28 at p. 34.
[45] See 28 at p. 2.

and institute reforms that would legitimate and institutionalize the de facto status of independent paralegals. To date the Law Society of Upper Canada has been successful in stalemating all reform initiatives.

Despite the effort of bar associations in general, and the Law Society of Upper Canada in particular, to prohibit, or at best minimize, the existence of the unauthorized practice of law and independent paralegals, the independent paralegal is indicative of the prevailing culture in the new civilization. UPL is a cultural remnant of a civilization in its final stages of atrophy. Independent paralegals will ultimately survive and prosper because they fit into the new legal services paradigm. They are providing high demand legal services to an informed public. As the next chapter will demonstrate, a paradigm shift in professional services has taken place which assures that there will be a role for the independent paralegal.

Chapter Three

The Paradigm Shift in Legal Services and the Emergence of the Independent Paralegal

Introduction

The first two chapters of this thesis have outlined a state of affairs that does not bode well for either lawyers or paralegals. Lawyers are in control of the politics of the legal profession which they have used to guarantee their dominance as legal services providers to the public. However, the price they have paid in taking this route has been to distance themselves from that very public whose interests they are supposedly dedicated to serve.

Paralegals, whether dependent or independent, exist because they are responding to the demonstrated service needs of the public. Indeed, in the definitive case on the legitimacy of independent paralegals, *Regina v. Lawrie and POINTTS Ltd.*, in the Ontario Court of Appeal, Blair J. A. made the following observation:

> It is not the role of this court to determine whether, as a matter of policy, the operations of the respondents serve the public interest. It is obvious from the business they have attracted that they are providing an unmet need for service to the public.[1]

However, as the latter part of chapter 2 on the Politics of Paralegalism demonstrated, independent paralegals function at the fringes of the legal profession in a less than clearly defined role at the mercy of current interpretations on the unauthorized practice of law. They are marginalized legal service providers. They respond to their *de facto* role in a manner that lacks consistency. By their own admission and those of their supporters, paralegals are a service group in need of professional articulation and development. The Ianni Task Force Report contains numerous references to independent paralegals requesting a regulatory framework and professional development program that would be

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[1] R. V. Lawrie and POINTTS Advisory Limited. (1987), 32 CCC (3d) 549 (Ont CA) at 567.

institutionally based. One of the central recommendations of the report is for a formalized community college based training program.[2]

This is all on the verge of changing. Independent paralegals are becoming organized. A college training program for independent paralegals is now in place in the Ontario community college system. A paradigm shift has taken place in the professional services marketplace that is forcing lawyers to revisit their profession and begin to acknowledge the need for change. Independent paralegals are beginning to assert themselves and in the process are carving out substantive legitimized roles within the legal services marketplace.

This chapter will explain the basic nature of the concept of the paradigm shift and indicate the forces are creating a new professional services paradigm to which the legal profession must conform or risk being relegated to the margins of the professional services field.

Paradigms

> In its established usage, a paradigm is an accepted model or pattern, and that aspect of its meaning has enabled me, lacking a better word, to appropriate paradigm here.
>
> Patterns gain their status because they are more successful than their competitors in solving a few problems that the group of practitioners has come to recognize as accurate.[3]

The word paradigm and the term paradigm shift have taken on an almost cliché-like status in contemporary socio-economic and political analysis, not to mention their popularity in the business policy field. Thomas S. Kuhn, from whose work the above quotations were taken, has been credited with introducing the concept into contemporary analytic methodology.

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2 R. W. Ianni, Commisioner. Task Force Report on Paralegals, Ontario Ministry of the Attorney General (1990) see generally.

3 Thomas Kuhn, The Structure of Scientific Revolutions, (2nd ed) The University of Chicago Press (1996) at p. 7.

A paradigm is a belief system. However, it is not based on blind faith. It is instead a set of principles developed through a rational process that is based on observation, analysis and conclusions.

A paradigm is not an evolutionary system that is changing. It is finite with articulated terms of reference constructed by means of the above mentioned process. When a paradigm loses its ability to provide the methodology and mechanisms to manage occurrences and events that are encompassed within its terms of reference, a paradigm shift occurs. The old paradigm is discarded and out of the resultant chaos a new paradigm emerges.

Kuhn initially developed the concept of paradigm shift to explain the nature and course of fundamental changes in scientific beliefs. What is accepted as an irrefutable scientific belief, or truism, at a given point in time is abandoned in favour of a successor, often unrelated, scientific belief at another point in time. The replacement of a belief system or paradigm with another was often dramatic and chaotic, hence the label shift. In the beginning of the 15th century, it was a generally accepted scientific fact that the earth was the centre of the universe. By the beginning of the 16th century, it was a generally accepted fact that the sun was the centre. This dramatic about-face in scientific beliefs is an example of a paradigm shift.

Although the basis of his work was science, Kuhn was convinced that the concept of the paradigm shift had a universal application that explained dramatic transformations in societal institutions in general. To quote:

> The generic aspect of the parallel between political and scientific development should no longer be open to doubt. The parallel has, however, a second and more profound aspect upon which the significance of the first depends. Political revolutions themselves prohibit their success, therefore necessitates the partial relinquishment of one set of institutions in favour of another, and in the interim, society is not fully governed by institutions at all. Initially it is crisis alone that attenuates the role of political institutions as we have already seen it attenuate the role of paradigms. In increasing numbers individuals become increasingly

> estranged from political life and behave more and more eccentrically within it. Then, as the crisis deepens, many of these individuals commit themselves to some concrete proposal for the reconstruction of society in a new institutional framework. At that point the society is divided into competing camps or parties, one seeking to defend the old institutional constellation, the others seeking to institute some new one. And once that polarization has occurred, political recourse fails[4].

Two well-known Canadian labour market economists, Gordon Betcherman and Graham S. Lowe, provide an illustration of how the paradigm concept has assumed a wide ranging application well beyond the parameters of conventional science. In their 1996 study, *The Future of Work in Canada*, they describe the dramatic changes taking place in a paradigmatic context.

> Concerns about the future of work are as old as economic change itself. However, there are periods when technological innovation and economic restructuring are particularly rapid and profound. In these periods of transition, which some economists call a shift in the "techno-economic paradigm," not only do lives tend to become more turbulent, but the "anchors" provided by existing social institutions become less and less effective in helping people adjust to changing times. New anchors need to be put in place. Otherwise, the economic changes bring too much personal risk, with too little collective security to cushion the transitions.[5]

The above quotation serves two purposes. First, it illustrates the degree to which paradigmatic theory and principles are being applied in a field that is distinct from the discipline of science. Next, it indicates the validity of paradigm logic in explaining the rationale for dramatic changes or shift in the labour market. Independent paralegals represent a segment of the labour market. The struggle between the legal profession and independent paralegals is about the politics of the legal services market for labour.

A transformation of similar proportion is taking place within the justice system. The justice system is undergoing a paradigm shift from a belief system that was designed to serve a semi-literate society that was deferential to hierarchical authority in an industrial age, to one that will respond to the needs of a literate society in which everyone has

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4 Ibid at p. 93

5 Gordon Betcherman and Graham S. Lowe, The Future of Work In Canada, Ottawa: Canadian Policy Research Network, 1996.

access to information, and information has become a commodity rather than a scarce resource.[6] The independent paralegal system owes its acceptance as a legal services provider in the Ontario Provincial Court system to the existence of a paradigm shift. The public is open to alternatives to lawyers as legal service providers.

The justice system is the dominant belief system that defines the service parameters of legal services providers. The legal profession can only dominate the provision of legal services to the extent that its terms of reference are compatible with the justice system. As the Ianni Report and Canadian Bar Association's, Systems of Court Justice Task Force Report clearly indicate the justice paradigm has shifted from a closed system to an open system.

It is the irrefutable force of this paradigm shift that will eventually bring about the change in the politics of the legal profession necessary to enable the independent paralegal to achieve the status as legitimized stakeholder in the process.

The Justice System Paradigm Shift

There is a growing lack of public confidence in and acceptance of the justice system. Society in general is going through fundamental changes that have made accommodation with the conventional justice system increasingly problematic. The public is looking for alternatives. Indeed, one of the increasingly popular justice system models is characterized by the label Alternative Dispute Resolution (ADR).

A full analysis of the nature and thrust of the justice system paradigm shift is a topic well beyond the scope of this thesis. However, it is certainly within the parameters of this thesis to advance the proposition that the justice system is in the throes of a fundamental paradigm shift. Moreover, that paradigm shift encompasses a willingness by the public to seek out new legal services and legal service providers of which independent paralegals constitute a component.

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[6] Canadian Bar Association, Systems of Civil Justice Task Force Report, Ottawa: Canadian Bar Association, 1996.

What the previous chapters have demonstrated is that although independent paralegals are playing an increased role in the provision of legal services in general, there is still a dominant institutional group in the justice system intent on propagating the status quo. Moreover, its status is protected by a government sanctioned monopoly. Any successful legal services initiative that encompasses independent paralegals in a formal sense, at least at the Provincial Court level in Ontario, requires the current monopoly on the practice of law and control of the court system by lawyers to change. That requires an act of political will by the Ministry of the Attorney General. That act of political will depends to a considerable extent on the degree to which the Attorney General in convinced that there is evidence of a new professional services paradigm. Thomas J. Courchene of Queen's University provides the following succinct statement on the fundamental nature and context of the paradigm shift, encompassing the public's belief in a new professional services paradigm and the validity of the independent paralegal as a service provider.

> The world is in the throes of one of its truly epic transformations, which ... I shall encapsulate in the terms "globalization" and the "knowledge information revolution. "In effect, this new revolution will likely do for human capital what the industrial revolution did for physical capital. This has immediate and dramatic impact on one's conception of social policy - with knowledge progressively at the cutting edge of international competitiveness, aspects of social policy now become indistinguishable from economic policy. This is not without its own set of challenges, since the middle class in a knowledge world must include the likes of technologists, paraprofessionals and information experts, and so on.[7]

Courchene is not alone in identifying the emergence of the paraprofessional as a person of higher value and status in the new information society. In 1990, the Economic Council of Canada published Betcherman's study, *Good Jobs, Bad Jobs.*[8] It documented the shift in the Canadian labour market from a resource based to a service based economy with strong demand for technologists and other support service providers, the latter conforming to the label of paraprofessionals. Numerous other Canadian and United

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7 Thomas J. Courchene, Canada In The New Social Millennium, CD Howe Institute (1994) at p. 4.
8 Economic Council of Canada, Good Jobs. Bad Jobs, Supply and Services Canada, 1990.

States authors on the subject of the labour market, ranging from former U.S. Secretary of Labour Robert Reich[9] to MIT professor and business management guru Lester Thurow,[10] talk about the emergence of the technician and paraprofessional (under their own preferred labels) in the new economy.

Professionals in the legal services field have begun to publish material which incorporates what Courchene has said in a general sense into a legal services context. David Maister, a one-time professor at the Harvard Business School, undertook a series of comprehensive studies of the nature and content of the provision of professional services by law firms. He found that as much as 40% of the actual work that needed to be done, regardless of the actual complexity of the jurisprudence, could be performed by paraprofessionals. Advances in technology in the information age are providing law firms with the potential to restructure the employment component to increase the number of paraprofessionals and expand the nature of their work. To quote from Maister: "The firm's hiring needs would expand to include a major role for less skilled professionals and more paraprofessionals, since the increased restructuring of familiar engagement types would allow the firm to employ an increasing degree of systems and procedures and hence require less mature talent."[11]

Justice Richard Posner of the United States Court of Appeals for the Seventh Circuit, an outspoken critic of the conventional legal system, supports Maister's position. Indeed, he is prepared to take the matter of the status of paraprofessionals in the justice system a step further. He sees paralegals playing an increasingly prominent role as players in their own right in what he envisages as a new practice of law. On the basis of his considerable research, which is admittedly the subject of controversy in the legal profession, he provides the following vision for the future of the legal profession:

> I predict that as the legal profession opens up to diverse recipients and backgrounds, as paralegals become authorized (as I hope and believe they someday will) to form their own law firms and compete with real lawyers,

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9 Robert J. Reich, Work of Nations: Preparing Ourselves for Twenty First Century Capitalism, Alfred A. Knopf, 1991.
10 Lester Thurow, Head to Head: The Coming Economic Battle Among Japan and America, William Morrow and Company, 1992.
11 David Maister, Managing the Professional Services Firm, The Free Press (1993) at p. 25.

> as bankers, accountants, statisticians, economists, computer engineers and management consultants play an increasing role in the formulation and application of law, as law firms grow, diversify and become increasingly international, as legal education becomes more optimal, hence more practical, and its frills are discarded, as judiciaries become larger and more specialized, and as law, like the rest of social life, becomes more and more quantitative and computerized, the traditional preoccupations that go by the name of jurisprudence will seem and be increasingly irrelevant.[12]

Professor Harry Arthurs believes that the information society has created an information overload within the legal profession. No lawyer can realistically hold him or herself out as the well-rounded learned professional who is competent to serve the public in the practice of law. "The exponential growth of legal knowledge, combined with the diversification and stratification of legal practice, ensures that no lawyer will ever be able to master all legal knowledge."[13] In his opinion, "we should overtly acknowledge the falsity of the proposition that lawyers constitute a single profession, with a common educational credential, a standard model of professional training and an all purpose licence to practise".[14]

The information society has also created a situation in which there is a growing number of what Arthurs calls paraprofessionals who now have the skill-based competencies to perform many of the routine services that were formerly believed to require the services of lawyers. "On the other hand, in many areas paraprofessionals can (and do) most of the routine work over which fully qualified lawyers claim an exclusive monopoly."[15] Consequently, what is now needed is a complete rethinking of the legal profession and the services provided by it with a recognition of the new role for paraprofessionals. The author draws once more on the remarks of Arthurs, who in light of his background as a law professor and former dean of one of Canada's leading law school's, suggests the creation of a professional development framework that recognizes the new legal services paradigm.

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12 Richard Posner, Overcoming Law, University of Chicago Press(1995) at p. 79.

13 H. W. Arthurs, Changing World-Challenging Times: Lawyering in Canada in The 21st Century," Canadian Bar Association Task Force on Civil Justice System Background Papers (1996) at p. 22.

14 Ibid at p. 23.

15 Ibid at p. 23.

> We should therefore seriously consider two complementary measures: reducing the educational and training qualifications required of lawyers who wish to practise exclusively in these areas, and extending the right to practise to both qualified lawyers and trained paraprofessionals.[16]

When the above comments by Posner and Arthurs are read in conjunction with the previous quotation by Courchene, there are clear parallels in thought between leading social policy analysts and legal professionals. What Courchene talks of within the context of a general revolution within the labour market and workplace organization, Posner, Arthurs and Maister make specific within the context of the legal profession and the practice of law.

Just as form inevitably follows function, culture must conform to the prevailing mores and values of a given age. Taken together as variations on a common theme, there is solid evidence that a transformation radical enough that it qualifies as a paradigm shift is taking place in the legal services field. The public and public opinion no longer subscribe to the belief that lawyers are the preferred providers for the complete range of legal services. There is now a belief that routine legal services and an emerging range of alternative legal services might be better or just as well provided by paraprofessionals, or independent paralegals as they are labelled in this thesis.

Although Posner's and Arthurs' postulations are admittedly controversial, when one gives careful consideration to the full thrust of their remarks on the future of the legal profession and the practice of law in its fullest dimension, the rationale for and inevitable logic of the emergence of the paralegal/paraprofessional is in keeping with mainstream thought within the legal profession. From 1992 through 1994, the American Bar Association conducted an extensive nationwide study into non-lawyer practice. In the opening pages of its final report on the matter it set the tone for its central theme with the following observation:

> A major opportunity for enhancing law practice and improving access to legal services enables more extensive utilization of paralegals. The

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[16] Ibid at p. 23.

> commission recommends that the range of activities of traditional paralegals be expanded with lawyers remaining accountable for their activities. There are many ways that paralegals can enhance productivity, efficiency and quality in all law practice settings. Among the possibilities are their undertaking an increased number of appropriate tasks, including such work as preparation of paperwork in administrative claims, working as freelance paralegals when services of full time paralegals are not needed and possible assuming of expanded substantive responsibilities.[17]

There is now a widespread belief both within and outside the legal profession that the parameters that have traditionally spelled out the terms of reference for legal services providers, particularly lawyers, have changed. To paraphrase the remarks of Courchene, the legal profession under the justice system must now include the likes of paraprofessionals in their composition of a legitimate stakeholder group.

However, court services in Ontario have not shifted to accommodate this new professional services paradigm and are far from being "reinvented". The reason that they are not is essentially due to the politics that have shaped and driven the legal profession and, through its influence, the justice system and courts administration agenda in Ontario, as well as the rest of Canada, for more than a century. As the chapter on the legal profession pointed out, the Ontario justice system and the administration of the courts have been dominated by a professional group with a closed mind set whose terms of reference and *modus operandi* for all intents and purposes exclude all other stakeholder groups. Until the Ontario government is prepared to come to terms with the politics associated with this state of affairs, the Ontario justice system will remain in a status quo position and defy any attempts to bring it under the broad umbrella of the reinvention of government movement, particularly in the area of improved caseflow management.

This thesis therefore endorses the position developed by Professor Donald J. Savoie. He undertook a thorough analysis of the attempts by politicians in Great Britain, Canada and the United States to reinvent public administration through the injection of private sector management principles and techniques into the design and delivery of government

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[17] American Bar Association, Nonlawyer Activity in Law-Related Situations, American Bar Association Commission on Non-lawyer Practice (1995) at p. 5.

services. He came to the conclusion that radical change in public administration was only possible if preceded by a radical change in the politics of the government process itself. To quote, "politicians are probably in greater need of courses in governance to assume their roles and responsibilities than career officials are in need of management development courses".[18]

That being said, the preferred method for the provision of new public services then becomes open to discussion. Savoie supports a strong public service empowered to design and deliver a full range of programs that respond to current public needs. This thesis would agree with that position to the extent that there is a public sector presence in place to take on this responsibility. However, where that is not the case then there is the potential to use different delivery mechanisms, among which are service delivery partnerships between the public and private sector.

The next section of this chapter will provide the reader with information on how the court system can be reinvented on the basis of a service partnership and what the Attorney General for the Province of Ontario must be prepared to do to effectuate much needed change.

The Paradigm Shift and the Reinvention of Government Services

In their best selling text on the current state of government services, *Reinventing Government*, David Osborne and Ted Gaebler attribute the following observation to British economist and public policy sage, John Maynard Keynes: "As the great John Maynard Keynes once noted, the difficulty lies not so much in developing new ideas as in escaping old ones."[19]

That observation is a succinct and accurate description of the developments taking place in public policy and government service circles today. To quote from Savoie's text on the topic of the search for a new bureaucracy:

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[18] Donald J. Savoie, Thatcher, Reagan, Mulroney. In Search of a New Bureaucracy, University Toronto Press (1994) at p. 332.

> Historians will look to the 1980's as the watershed period in the development of Western bureaucracies. By the early 1980's, public bureaucracies stood accused of being many things: bloated, cumbersome, uncreative, lethargic, and insensitive. This widely negative perception could be found in many countries.[20]

That being the state of affairs, one would expect this period to have produced a watershed of new concepts and ideas from the public sector on how to reinvent their bureaucracies. However, as Savoie goes on to document in considerable detail, when all was said and done, the 15-year period from 1979 through 1994 saw little accomplished in the form of any real reinvention of government. What emerged during this period was a series of highly publicized and much lauded "management" initiatives to reform the public sector but no serious effort to challenge, let alone attempt to change, the underpinnings of the Western bureaucratic government and the manner in which it functioned. To quote Savoie:

> Officials working in policy units were well aware of the political leadership's focus on management. They saw efforts to remove "administrative shackles" but to leave "policy shackles" intact. The politicians had made it clear, time and time again, that they wanted "doers" not "thinkers".[21]

When one reflects on the work of Thomas Kuhn, the behaviour of politicians is rational and understandable. They are well ensconced in a preeminent position in an established political paradigm, the Westminister parliamentary model of government. They would be understandably loath to let go of their power of their own volition. As long as the paradigm continues to be supported by public opinion they will not initiate substantive change, particularly the fundamental change representative of a paradigm shift. They will talk the talk but not walk the walk.

David Osborne, co-author of *Reinventing Government*, provides a disturbing account of how Canadian political leaders do this when it comes to truly reinventing government.

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19 David Osborne, Ted Gaebler, Reinventing Government, Addison Wesley (1992) at p. 23.

20 Donald Savoie, Thatcher, Reagan, Mulroney. In Search of a New Bureaucracy. University of Toronto Press (1994) at p.3.

He uses former Prime Minister Brian Mulroney as a case study of a political leader who lacked the courage to commit the federal public sector to real reinvention.

> Brian Mulroney's story is all too common. It is the story of a public leader who wants change but is unwilling to pay the price. Mulroney was unwilling to take the heat from those who would lose out through privatization. He was unwilling to devote his personal attention and political capital to the task of improving government performance. He was unwilling to take real power away from his central control agencies. He was unwilling to invest the time, energy and resources -- the blood, sweat and tears -- it takes to reinvent government.[22]

In Savoie's opinion, government services have entered the 1990s in much the same state as they left the 1970s and the 1980s. All of the talk of reinventing government during the past two decades has been more rhetoric than reality. However, he shares the opinion of the overwhelming majority of public policy analysts in believing that, at least in the case of Western democracies, the government services ship can no longer continue to sail on. Governments must be prepared to let go of the old ideas about bureaucracies and how they should function and explore radical new options. He outlines the general thrust and nature that these new options should take in the concluding paragraph of his book.

> The challenges ahead are clear. Governments need a stronger capacity to develop policy, to react to fast-changing circumstances, and to bring together groups to get things done. Bureaucracies also need a stronger capacity to challenge their own operations and to be self-critical. This requires new ways for government organizations to be born or put to death: The challenge is to tackle institutional sclerosis and it is a challenge the reforms of the 1980's did not meet.[23]

This chapter will focus on an example of how the Attorney General of Ontario can act on one of the central recommendations in Donald Savoie's concluding message, to bring together groups to get things done, and in the process begin a real reinvention of government initiative that will accommodate a paradigm shift in the provision of legal services. The two groups are the court administrators in the Provincial Offences Act

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21 Ibid at p. 343.

22 David Osborne, and Peter Plastrek, Banishing Bureaucracy: The Five Strategies for Reinventing Government Addison - Wesley (1997) at p. 325.

Court and private sector providers of legal services, independent paralegals. What can be accomplished by bringing them together in an innovative private sector / public sector partnership is is the provision of cost-effective caseflow management of highway traffic offences within the Provincial Court system.

POINTTS Advisory Limited is being used as a case study in this instance to illustrate the potential for the Attorney General to implement cost-effective caseflow management that functions as a reality and not just the latest in a series of rhetorical pronouncements that have dominated the history of caseflow management in the Province of Ontario to date. The case study will also illustrate the supportive role that a private sector / public sector partnership can play in the implementation of client-focused services in the public sector.

This chapter will first provide an outline of some of the basic principles associated with quality or customer / client-focused services in the contemporary Canadian and Ontario public sector environment. It will then demonstrate on a case study basis how a private sector / public sector partnership can facilitate the achievement of quality services in the provincial court system in Ontario.

The New Public Management and Service Quality Management in the Canadian Public Sector

Quality management is beginning to have a legitimacy of its own in the design and delivery of services in the public sector. In its earliest evolutionary stage there were a variety of attempts to transfer the principles and practices of total quality management (TQM) part and parcel from the private sector to the public sector. Those initiatives met, at best, with limited short-term success.

The Province of Ontario's service quality initiative under the auspices of the Management Board Secretariat exemplifies the failure of these ill-fated early quality initiatives. In 1991, the government published a combination research report and guide titled *Best*

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[23] See 20 at p. 345.

Value for Tax Dollars: Improving Service Quality in the Ontario Government.[24] It was intended to serve as a blueprint for the design and delivery of customer / client-focused public services throughout the public sector. Customer focused service quality is one of the primary goals of the reinvention of government concept.

The statement of the central theme underlying the report provides a succinct illustration of the blind optimism associated with the introduction of the quality principle into the public administration sphere. "Our willingness to change is on the rise, everyone is talking about service quality. We can accomplish amazing things together, the time is now."[25]

To demonstrate the degree of its commitment to service quality, a year later the Management Board Secretariat published what was touted to be a workbook to enable almost every government ministry and agency to adapt their program delivery to conform to the elusive concept of service quality. The workbook sets out the following ambitious mission statement on the first page of its preface.

> Improving Service Quality: A Workbook for the Ontario Public Service builds and expands on the tools and strategies described in the Customer Service Task Force Report, Best Value for Tax Dollars: Improving Service Quality in the Ontario Government. It gives management and staff a practical approach to improving service quality by improving the service process.
>
> Since poor design of service processes is a major cause of quality problems, this workbook emphasizes evaluating and improving service processes, not evaluating the people providing a service. Making service processes more effective and efficient will result in improved service at a lower cost. This workbook will help you look at your existing service processes rather than rethinking your whole service function or business.
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> The improvement method outlined is generic. Management and staff can apply it in a variety of Ontario Public Service workplaces and service processes.[26]

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[24] Management Board Secretariat, Best Value for Tax Dollars: Improving Service Quality in the Ontario Government, (Government Publication, 1991).

[25] Ibid at forward.

[26] Management Board Secretariat, Improving Service Quality in the Ontario Government. A Workbook For The Ontario Public Service, (Government Publications February 1993) at p. i.

It became obvious at a very early stage in its life that while the mission might well have been noble in principle, it was fundamentally flawed in practice. The service quality model was essentially a very close adaptation of a model that was initially developed by the American team of Parasuraman, Zeithaml and Berry in the U.S. These three retail marketing consultants had been experimenting with ways in which to capture the essence of service quality issues in simple transaction-based sales between retailers and customers in the private sector marketplace. In 1985 they developed what they themselves conceded was a tentative model describing the fundamental principles.[27]

The majority of services provided by public sector ministries and government agencies are not transaction based. They are relationship based. Customers in a retail establishment typically engage in a straightforward purchase transaction. They look at the merchandise, pick out or are sold an item they want, and pay a market-based price for it. Many government services are monopolies that envisage a long-term ongoing relationship between the government agency and the client at a price that reflects public policy considerations. It is generally recognized, even by Parasuraman and her co-authors, that the terms of reference for quality in the design of complex services such as education, health care and justice and the measurement of quality in their delivery to the public, is vastly different than in the case of simple retail sales. The Management Board Secretariat erred in looking to the wrong model to implement service quality in the Ontario public sector. Moreover, it made the mistake of attempting to apply a simplistic solution to a complex problem.

For example, on the basis of the Parasuraman *et al.* model, the Management Board Secretariat service quality model defines the basic concept as follows: "Service quality means giving service to customers that meets their needs".[28] That is certainly an accepted truism in the private sector marketplace for goods and services, although

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[27] A. Parasuraman, Valerie. Zeithaml, Leonard L. Berry, "A Conceptual Model of Service Quality and Its Implication For Future," Research Journal of Marketing, 49 (Fall 1985), pp. 49-50, see also A. Parasuraman, Leonard L. Berry and Valerie Zeithaml, "Understanding Measuring and Improving Quotas," Finding from a Marketplace Research Program, Service Quality Stephen W. Brown (ed), Lexington Books, 1991.

[28] Ibid at p. 56.

whether customers get what they really want or what is marketed to them is the subject of an ongoing debate. However, within the context of complex public services it is hardly instructive to public sector policy advisors and managers. Two American public administration professors, Geert Buckgert and Arvie Haladine, editors of a recent text on contemporary public management issues, provide what is a more accurate description of the basic principles of service quality management as applied to the public sector.[29] They relabel it total quality policy (TQP) and postulate the following seven principles that are at the core of service quality management in the public sector.

The seven principles of TQP are:
(1) avoid the "wrong problems" problem;
(2) practice citizen centred government;
(3) engage in transformational policies;
(4) use candour and courage regarding costs;
(5) be fair and equitable;
(6) respect public service
(7) cautiously sustain the free enterprise system.[30]

Fortunately, in light of the growing interest in service quality management in the public sector, the type of problems associated with the Ontario initiatives are now avoidable and, more importantly, are being avoided. Progress is beginning to be made in articulating relevant terms of reference for service quality management in the Canadian public sector and comprehensive service quality program models that bear a resemblance to TQP are being developed. Actual programs are still in their embryonic stage.

Peter Aucoin of Dalhousie University has emerged at the forefront of a group of academics and public policy analysts who are attempting to define the parameters and terms of reference for service quality in the Canadian public sector.[31] The parameters are based on two assumptions which place Great Britain, Australia, Canada and New Zealand in a special class of democratic governments which are based on the Westminster parliamentary model.

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29 Geert Buckgert and Arvie Haladine, The Enduring Challenges in Public Management, Jossey-Bass, 1995.
30 Ibid at p. iv.

> The first is that responsible government is best secured through the dynamics of party politics in order that government, including the state bureaucracy, be subject to democratic control. The second is that good government is best secured through a professional, nonpartisan public service, or "constitutional bureaucracy," as Henry Parris calls it, that serves government but nevertheless is staffed and managed as an institution independent of party politics. The tension inherent in these two assumptions has long been recognized but traditionally accepted as part and parcel of the public interest in securing effective democratic government, on the one hand, and competent public administration, on the other.[32]

The terms of reference are captured in the label of the new managerialism. It is new in that it is not an attempt to foist principles and practices developed and perfected in the private sector on to the public sector. Savoie has done an excellent job pointing out the futility of the Thatcher, Reagan and Mulroney-era politicians' attempts to managerialize the public sector. To quote Savoie:

> Virtually to a person the career officials consulted in all three countries (Britain, Canada and the U.S.) wanted to discuss at some length, at times with no urging on my part, how the business community and many elected politicians have little or no appreciation of the backdrop of rules and regulations they must contend with in their work nor of the kind of political context they must operate in.[33]

Savoie refers to the work of McGill University professor and international management guru Henry Mintzberg to support the position of senior public sector managers and public policy analysts like himself, that management in the public sector is fundamentally different from management in the private sector. They are not counterparts.[34] Mintzberg expounded on this position in a feature article in the *Harvard Business Review*. He describes what is essentially a dichotomy between the private and public sectors and the problems that have arisen in attempting to graft private sector managerial techniques on public sector management practices. "Do we really want our governments to be like a

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31 Peter Aucoin. The New Public Management: Canada in Comparative Perspective. Montreal: Institute for Research on Public Policy 1995.

32 Ibid at p. 23.

33 See 18 at p. 294.

34 Henry Mintzberg, "Managing Government, Governing Management," Harvard Business Review, (May-June, 1996).

toothpaste company, hawking products? Couldn't the current malaise about government really stem from its being too much like business rather than not enough?"[35]

The "new managerialism" represents a breakaway from the confines of a private sector methodology in quality management. It addresses the real challenges the public sector faces in reinventing itself within a framework and context that respects and embraces the essence of the public citizen as a customer or client with the inherent right to a prescribed level of acceptable service. The terms of reference for the "new managerialism" are outlined by Aucoin as follows:

> All too often, however, proposals to adopt the methods of the private sector in public administration have floundered precisely because they have prescribed a degree of autonomy for public servants that has not been acceptable to ministers. The new public management has resulted in a revolution in public administration, primarily because much of its reform program has been designed *within* government. Advisers from outside government have played a major role in some cases, but they have had to cast their ideas in ways that meet the essential character of public administration.
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> This has required adherence to at least three conditions. First, the superior position of ministers, and therefore the subordinate position of public servants, has had to be respected. Hierarchy remains a fundamental principle of government, even where efforts are made to separate policy and operation responsibilities between ministers and public servants respectively. Second, the continuing need for the corporate management of government, which inevitably restrains discretion, has had to be acknowledged. Even where there is a significant measure of delegated authority, departments and agencies as parts of government must be subject to at least a minimum set of values and standards. Third, the business of government must still be governed by law, however, much of the operations of government are re-engineered in response to the dictates of economy and efficiency, opportunities provided by new information technologies or demands for quality service. In respecting the primacy of these three conditions, public administration remains subject to democratic control.[36]

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[35] Ibid at p. 77.
[36] See 31 at p. 8-9.

Within the context of the new managerialism in the public sector there is now considerable study being undertaken to develop methods for delivering services to the public by a public sector that is being forced to reinvent itself in response to shrinking public funds and growing demand for public services. In a recently published text dealing with the demands placed on the public sector by its client base, F. Leslie Seidle, then Governance Research Director at the Institute for Research on Public Policy, pointed out that the public sector must develop new and innovative ways to provide services that are of value to the public it purports to serve. In more and more cases there are private sector alternatives to traditional government services encompassing the gamut from education to police protection, health care and the postal system.

The public has been conditioned by the private sector to expect market niche quality in the provision of services. In fields such as financial services and telecommunications the public is being offered the potential to acquire a seemless web of converging services that emphasize customer focus and convenience. Governments must be prepared to play on this field or risk the wrath of a public who will refuse to support what it believes are inadequate service systems.

Seidle has developed a compendium of criteria for quality delivery of public services. The criteria of responsiveness, accessibility and reliability all have a quality management focus. The fundamental thrust of all quality management initiatives is to produce goods and services that are responding to the needs and preferences of clients. The goods and services produced by a quality management program are intended to be reliable and of high quality relative to the cost of producing them.[37] Moreover, quality management programs all subscribe to the fundamental doctrine that all goods and services be the best fit for use and consumption by the end user.[38]

The nature and type of service delivery being contemplated by public sector service providers is a dramatic departure from what has been the status quo for most of this century. A new set of rules is emerging to conform to a new set of beliefs and service

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[37] Leslie F. Seidle, Rethinking the Delivery of Public Services to Citizens, Montreal: Institute for Research on Public Policy, 1995.

expectations in an information age. The transition and the transformation are paradigmatic. To quote from Osborne and Gaebler in *Reinventing Government:*

> We last "reinvented" our governments during the early decades of the twentieth century, roughly from 1900 through 1940. We did so, during the Progressive Era and the New Deal, to cope with the emergence of a new industrial economy, which created vast new problems and vast new opportunities in American life. Today, the world of government is once again in great flux. The emergence of a postindustrial, knowledge-based, global economy has undermined old realities throughout the world, creating wonderful opportunities and frightening problems. Governments large and small, American and foreign, federal, state, and local, have begun to respond.[39]

The service quality response has been helped on the one hand and constrained on the other hand by developments that have taken place in the private sector. The TQM and reengineering initiatives in the private sector have generated a management revolution that has set both the tone and pace for changes of all manner and dimensions in the supply of goods and services in general. The public sector must respond to the developments associated with this revolution in a manner that conforms to emerging public expectations while preserving its own integrity.

In *Rethinking the Delivery of Public Services to Citizens*, Seidle presents a synopsis of the work of James Swiss to illustrate how this adaptation is being done in the service quality field. It is important to note in the following illustration how what Swiss portrays goes well beyond the blind private sector cloning seen in the abortive Management Board Secretariat initiative. It instead represents a true adaptation of private sector principles to the public sector in a manner that respects the essential integrity of the public sector.

A lively debate continues as to the degree that TQM can be sensibly and effectively applied to public-sector organizations -- a debate that is far from being concluded. Swiss contends that the use of what he refers to as "orthodox TQM" in government faces the following problems:

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[38] Treasury Board of Canada Secretariat, Service Standards A Guide to the Initiative, Treasury Board of Canada Secretariat, 1995

[39] See 19 at p. xvi.

- TQM was designed for routine processes such as manufacturing. Most government agencies produce services rather than products. Users of such service evaluate it on the basis of a number of factors and, accordingly, quality measures for service are "extremely complex."

- Defining the "customers" of public agencies is "a difficult and politically controversial issue," and such agencies "have obligations to more than their immediate clients."

- TQM includes a strong emphasis on "how processes are performing," which means internal processes are a central target of campaigns to implement TQM. The assumption is that effective performance should lead to high quality output. In some respects, this focus on "processes" may be at odds with results-oriented procedures such as performance monitoring, which many public organizations have implemented and of which they are "justifiably proud."

- TQM is "demanding": it depends on "an extremely strong organizational culture with an almost single-minded commitment to quality," managers "continuously involved in improving management" and "active and continuous intervention from the top." Government culture, "structured to be open to many outside forces," is weaker than that of business.[40]

In light of these difficulties, Swiss has proposed a "reformed TQM" based on the following principles:

- *Client feedback:* It is useful "to track the reactions of an agency's immediate clients and to use them as one consideration in decision making."

- *Tracking Performance:* The successful introduction of tracking of quality (central to TQM) can pave the way for the addition of "other quantitative but results-oriented systems."

- *Continuous Improvement:* "[R]eceptivity to new approaches is essential for high performance" and, if fully accepted by management and staff, "would lessen the resistance to future system innovations."

- *Employee Participation:* Although employee participation, often called "empowerment," is difficult to put into operation, it remains "an important management axiom."[41]

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[40] See 37 at p. xvi.
[41] See 37 at p. 17.

The federal government has taken the lead in developing a working model for the design and delivery of comprehensive service quality management for the Canadian public sector. In February 1995 the Treasury Board of Canada Secretariat published a document titled "Service Standards: A Guide to the Initiatives". [42] The central theme of the report and the stated mission of the initiative are to respond to what the Treasury Board believes is the challenge of the 1990s for the public sector. Public services must be improved and the costs of delivering those services must be reduced.

Both of these goals fit within the central thrust of the quality management paradigm. The improvement of service to the customer and the manufacturing of a good or service in the most cost-effective manner, while maintaining a standard that responded to customer needs and preferences, are core principles in the TQM philosophy originally developed by W. Edwards Deming[43] and Joseph J. Juran,[44] two of the pioneers in the quality movement, and remain at the forefront of all TQM programs today.

The report makes it clear in the introduction that improved service is synonymous with "improving the client orientation"[45] of the service providers, public service employees. This is consistent with the fundamental principles of the new managerialism in the public sector. It fits within the criteria for quality delivery of public services developed by Seidle. It represents a fundamental shift in thinking from the traditional public sector management mindset summarized by Savoie. "In short the main difference between the public and private sectors is that the private sector manages to the bottom line, while the public sector manages to the top line" [46]

The new managerialism in the public sector and specific initiatives like the Treasury Board proposals are ambitious undertakings. They challenge the very essence of the long established status quo within the public sector and, by inference, are forcing the

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42 Treasury Board of Canada. Framework for Alternative Program Delivery, Ottawa. Treasury Board of Canada Secretariat, 1995
43 Andrea Gabor, The Man Who Discovered Quality, Penguin Books, 1992.
44 J.M. Juran, Managerial Breakthrough, McGraw-Hill, 1992.
45 See 37 introduction
46 See 20 at p. 134.

politicians who ultimately control power to provide public sector managers with an opportunity to empower themselves by establishing a direct link with the citizens who receive public services. Savoie once again provides an excellent analysis of the nature and extent of this challenge and its implications for the public sector.

> More important, politicians would have to trust the newly empowered bureaucrats to make the right decisions in their dealings with their clients. This was no small task. As we have seen, politicians had shown time and again a general disdain for public bureaucracies and had accused bureaucrats, among other things, of being uncreative, lethargic, and insensitive. To make the new managerialism work required a new mind-set, not just on the part of career government officials but also on the part of politicians.[47]

Are public servants up to this task? Are politicians up to this task? That remains to be seen given that the new managerialism really is new and service quality programs like the Treasury Board initiative are still very much in the conceptual and modeling stage. However, there is every indication that the time and circumstances are right for the fundamental shifts in government and public policy necessary to enable the new managerialism and service quality management to at least have an opportunity to get up and running.

The history of quality management has demonstrated in both Japan and the U.S., at least in the private sector, that its potential for initial acceptance within organizational structures and its subsequent success is directly proportional to the existence and extent of a crisis.[48] TQM, although not a form of crisis management, is invariably initially resorted to as crisis management remedy when all else has failed and there is a willingness to resort to radical measures and to make a paradigm shift.

Deming and Juran and their TQM philosophy were initially shunned in North America because American industry believed it didn't need their prescription. Deming in particular, with his radical message for a fundamental change in the way the Japanese

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[47] See 20 at p. 186.
[48] See 43 and 44 generally.

should organize their entire private sector business organizational structure, was listened to and followed in Japan only because of the desperate economic situation in that country.[49] Ford, initially, and subsequently GM and Chrysler were only prepared to contemplate a paradigm shift in management and embrace TQM when bankruptcy was staring them in the face in the late 1970s and early 1980s.[50]

The introductory section of this chapter outlined the extent to which the public has become disenchanted with the conventional public sector. Savoie has correctly pointed out the root cause of this disenchantment is political in nature. Politicians have flirted with new managerialism initiatives for the public sector without exercising the political will necessary to create a new public sector with the resolute capability to deliver the goods.

Savoie takes the position that the key to a reinvented public sector is a realignment within the political governance structure. A reinvented public sector can then emerge and respond to public need.[51] Sanford J. Borins believes that what is more likely to emerge is a new public management that embraces many of the principles and techniques associated with Osborne and Gaebler's "Reinvention of Government" school.[52]

As was mentioned in the introductory portion of the chapter this thesis supports the position of Savoie that substantive change in public administration can only occur through an act of political will that fundamentally alters the political governance structure. Once that bridge is crossed this thesis then supports the Gaebler and Osborne reinvention of government approach for the design and delivery of a caseflow management system for the Ontario Provincial Court system. This thesis will demonstrate in the chapter on caseflow management that this approach is preferable for the following reason. Politicians and senior level public servants have come to the realization that they have neither the resources, nor the political or managerial capability,

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49 See 43 generally.
50 See 43 generally.
51 Donald J. Savoie, What Is Wrong With The New Public Management? Canadian Public Adminstration (Spring 1995) Vol. 38, No. 1.
52 Sandford J. Borens, The New Public Management Is Here To Stay. Canadian Public Adminstration, (Spring) 1995, Vol. 38, No. 1.

to steer and row the ship of state in the manner in which they had become comfortably accustomed.

Out of crisis comes opportunity. Given the history of TQM, the paradigm shift in the marketplace for goods and services and the nature and extent of the crisis in government over the provision of government services to the public, a strong argument can be made that the time is ripe for a paradigm shift to the service quality management initiatives like those of the Treasury Board Secretariat. Peter Aucoin has undertaken a thorough and sober analysis of the short history of attempts by governments to embrace service quality. Despite its shortcomings and setbacks, because of a combination of design deficiencies and lack of political and managerial commitment, he comes to the following conclusion:

> Clearly, greater emphasis is now given to a client focus in the design and delivery of public services and regulatory activities. Senior line department officials, from deputies on down, are responding to pressures from citizens generally and from specific clienteles. These pressures are reinforced by demands for "empowerment" from staff at the delivery end. While the degree of responsiveness varies among departments, even departments and agencies that have prided themselves on their relations with citizens and client groups are making efforts to be, or at least to be seen to be more client focused.[53]

The Treasury Board Secretariat's Quality Services initiative is in keeping with Aucoin's prognosis. It also adheres to the principles of the new managerialism. Unlike the earlier initiative by the Ontario Management Board Secretariat, this is not an attempt to force fit the public sector into a private sector model. The Quality Services model developed by the Treasury Board begins by realizing that the clients the public sector provides services to are citizens. By inference they are not customers, an important distinction that is in keeping with the reality of the relationship that exists between the public sector and the citizens to whom it provides services.[54]

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[53] See 24 at p. 202.

[54] Treasury Board of Canada Secretariat, Quality Services Guide I-IX, Ottawa: Treasury Board of Canada Secretariat, 1995.

This runs contrary to one of the basic propositions put forward by Osborne and Gaebler. In their opinion the public sector should be treating those it serves as customer-like citizens rather than clients. The following is their rationale for this position:

> And yet, when we organize our public business, we forget these lessons. We let bureaucrats control our public services, not those they intend to help. We rely on professionals to solve problems not families and communities. We let the police, the doctors, the teachers, and the social workers have all the control, while the people they are serving have none. "Too often," says George Latimer, "we create programs designed to collect clients rather than to empower communities of citizens."
>
> Clients are people who are dependent upon and controlled by their helpers and leaders. Clients are people who understand themselves in terms of their deficiencies and people who wait for others to act on their behalf.
>
> Citizens, on the other hand, are people who understand their own problems in their own terms. Citizens perceive their relationship to one another and they believe in their capacity to act. Good clients make bad citizens. Good citizens make strong communities.[55]

Latimer and by inference Gaebler and Osbourne would do well to add lawyers to the list of professionals who have constructed a practice of law paradigm to collect clients dependent on them for the provision of all manner and type of legal services. Indeed, as chapter 2 in this illustrates, much of the public impetus to look to independent paralegals is due to a desire to obtain an alternative legal service that enables the client to be less dependent upon lawyers and their adherence to the practice of law as the preferred method of legal dispute resolution.

But it does not necessarily follow from a criticism of the manner in which some professionals have treated clients through entrenched practice paradigms, whether it be law or medicine, that there is something fundamentally wrong with the client approach for the provision of a service. Every relationship creates dependencies. That is why people enter into relationships with other people in their personal lives and service

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[55] See 19 at p. 52.

providers in their everyday life. They have needs and are dependent on others to service those needs, albeit in a relationship that is mutually beneficial and not self-serving.

Unfortunately the authors provide no documentation, other than the Latimer reference, to substantiate the source of their consternation with the client approach to service delivery. One can only surmise that because of the limited range of their study at the time of writing their book--the focus was on municipal services, many of which are essentially transactional rather than relationship based--their customer preference is germane to the municipal public sector. It certainly does not properly identify the nature and scope of many complex public sector services in which the public is dependent on a government services provider developing an ongoing relationship with them and, to varying degrees, acting on their behalf and in their best interests.

A perusal of the Treasury Board of Canada Secretariat quality service model and the guides indicates that what is being proposed in fact meets the criteria of what would be expected of a service quality model geared to deliver relationship-based services to clients. I have developed a comprehensive service quality management program for law firms which are involved in the design and delivery of relationship-based services to clients.[56] In the process of developing that model a review of the principles and techniques that encompass service quality management was undertaken. It is interesting and, quite frankly, reassuring to examine the Treasury Board model and see the degree to which it conformed to what are now considered to be the underlying principles of a comprehensive service quality program.

It is one thing to develop a service quality model but delivering it is quite another matter. Public sector program delivery is an issue under considerable scrutiny by government. Budgetary constraints as well as a genuine change in philosophy within government, particularly those governments associated with the new conservatism in Alberta, Manitoba and Ontario, have supported the proposition made popular by David Osborne and Ted Gaebler in *Reinventing Government* that governments should increasingly steer

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[56] John G. Kelly, The New General Counsel. Value added Services Provider, Toronto: Emond Montgomery, (1998) see Chapter 6.

(make government policy) and delegate the rowing (delivery of government programs) to others,[57]

What is not being proposed by those who subscribe to the steering and rowing school of thought is some sort of wholesale privatization of government services. In fact, Osborne and Gaebler provide what is arguably one of the most succinct statements on why privatization is not the ultimate solution to the government services problem.

> Privatization is one arrow in government's quiver. But just as obviously, privatization is not the solution. Those who advocate it on ideological grounds -- because they believe business is always superior to government -- are selling the American people snake oil.
>
> Privatization is simply a wrong starting point for a discussion of the role of government. Services can be contracted out or turned over to the private sector. But governance cannot. We can privatize discrete steering functions, but not the overall process of governance. If we did, we would have no mechanism by which to make collective decisions, no way to set the rules of the marketplace, no means to enforce rules of behaviour. We would lose all sense of equity and altruism: services that could not generate a profit, whether housing for the homeless or health care for the poor, would barely exist. Third sector organizations could never shoulder the entire load.[58]

What instead is being contemplated by governments of all stripes and persuasions in Western democracies are alternative methods for public sector program delivery. The Treasury Board of Canada Secretariat has published a report which provides a blueprint for alternative program delivery. It defines the concept as follows:

> Governments implementing alternative program delivery try to select the best way to deliver programs, activities, services and functions to achieve government objective, while creating a more client-oriented, affordable and innovative program delivery environment.[59]

The report lists ten different types of alternative program delivery. One of those, which is pertinent to this thesis, is partnering. To quote from the report, partnering is a

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[57] See 20 generally.
[58] See 20 at p. 139.

"collaborative arrangement between two or more parties based on mutual interest and a clear understanding, agreement or contract that sets out the objectives and terms of the arrangement. It is not a true legal partnership where the parties are liable for each other's actions. Partnering arrangements can be either formal or informal".[60]

This definition is certainly in keeping with the principles and parameters of the "new managerialism" in the public sector. It enables a public sector service provider to reach out for new and creative alternatives for program delivery while stopping short of actually surrendering its authority or political sovereignty.

Kenneth Kernaghan has taken the concept of private sector / public sector partnerships one step further and developed a classification framework which categorizes partnership on the basis of the power exercised by each partner.[61] The four classifications are consultative partnerships, contributory partnerships, operational partnerships and collaborative partnerships. Kernaghan acknowledges that this classification system is suggestive rather than a rigid categorization methodology. In practice a partnership may be a hybrid between two or more categories.

The two that are relevant to this thesis are operational and collaborative partnerships. These are defined by Kernaghan as follows:

> **Operational Partnerships:** These partnerships are characterized by "a sharing of work rather than decision-making power. The emphasis is on working together at the operational level to achieve the same, or compatible, goals." In some such partnerships, "power, in the sense of control, is retained by one partner, almost invariably the public organization involved, especially if it is providing the bulk of resources."
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> **Collaborative Partnerships:** In these partnerships, each partner exercises power in the decision-making process. These arrangements "involve the pooling of resources such as money, information and labour to meet shared or compatible objectives. Each partner gives up some

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59 See 54.

60 Treasury Board of Canada Secretariat, Framework for Alternative Program Delivery, Ministry of Supply and Services Canada (1995) at p. 1.

61 Kenneth Kernaghan, Partnerships and Public Administration: Conceptual and Practical Considerations, Canadian Public Administration, Vol. 36, No. 1, (Spring 1993).

autonomy." As with operational partnerships, a substantial measure of coordination is often present.[62]

To date, the work done by Kernaghan and Seidle has focused on "social partnerships ... between public sector and non-commercial organizations."[63] This is understandable given the forum in which the concept of public sector partnerships has developed. However, there is nothing to suggest that the concept of partnership cannot be broadened to incorporate public sector / private sector partnerships.

In fact, the author had an opportunity to design one in 1995 for a private sector law firm in Dallas, Texas, and a defunct savings and loan thrift corporation that had been placed under public trusteeship as part and parcel of a multi-billion dollar federal government bailout for the U.S. residential mortgage industry. In this instance, the public receiver in Dallas was in need of a sophisticated financial accounting system to account for tens of thousands of transactions involving government funds. It looked as though it would have to spend a considerable sum of money to design and develop a system. The law firm the author was working with was a 250 lawyer firm, one of the largest in Texas with offices throughout the state, that had a sophisticated in-house financial management system which was extremely costly to maintain.

There was money available within the public trustee's office to pay for financial administration fees. The author recommended that the law firm designate one of its in-house support services personnel as financial services administrator and approach the public trustee with a partnership proposition. They would, in effect, administer and account for all financial transactions for a fee in exchange for being provided with an opportunity to handle a considerable volume of legal work that went with those transactions. The public trustee would have outsourced the legal work in any event, but was now provided with an opportunity to leverage that outsourcing into a partnership opportunity. The public trustee would continue to maintain its regulatory authority over all transactions, but would outsource much of the transaction work to a private sector law

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62 Ibid.
63 Ibid at p. 62 and 63.

firm that had the demonstrated expertise and capability to provide a range of services in a cost-effective manner that would ultimately be a savings to taxpayers. The recommendation was accepted in principle. The law firm and public trustee commenced negotiations on the basis of forming a service partnership.

The next chapter of this thesis will provide an illustration of how an important function of public sector court administration in Ontario, caseflow management, has to date personified all of the attributes and characteristics of the public sector that talks the talk but consistently refuses to walk the walk in so far as adhering to the reinvention of government concept. Chapter 5 will present a case study of an independent paralegal service provider, POINTTS Advisory Limited, which is demonstrating the degree to which a *de facto* collaborative partnership between itself and the provincial prosecutors and court administrators is capable of implementing service quality management principles and practices in the Provincial Offences Act Court System.

In doing so, POINTTS Advisory Limited has in essence provided independent verification of the substance and veracity of the principles put forward in the Treasury Board Secretariat's Quality Services Initiatives and Kernaghan's suggested models for operational and collaborative partnerships.

Chapter Four

The Politics of Caseflow Management

Introduction

> Yet trial backlogs, the symptom of caseflow management problems, are usually discussed in terms of individual cases, rather than principles. Until the problem is attacked in these latter terms little progress is likely to be made. [1]

This quotation from the introduction to the chapter on caseflow management by Millar and Baar in their comprehensive text, *Judicial Administration in Canada*, is an appropriate introduction to the context in which caseflow management will be analyzed in this thesis. The primary goal of the court system is to provide a forum for the impartial adjudication of legal disputes between opposing parties. However, if cases cannot make it through the courts, or can only progress in a manner that is inordinately time consuming and cost prohibitive, that goal is at best the exception rather than the rule.

The related issues of case backlog and trial delay are not new problems in judicial administration. In 1955, Judge Ulysses Schwartz of the Illinois Appellate Court elucidated on the topic of delay in the justice system in the following historical context.

> The law's delay in many lands and throughout history has been the theme of tragedy and comedy. Hamlet summarized the seven burdens of man and put the law's delay fourth on his list. If the meter of his verse had permitted, he would perhaps have put it first. Dickens memorialized it in *Bleak House*, Chekhov, the Russian, and Molière, the Frenchman, have written tragedies based on it. Gilbert and Sullivan have satirized it in song. Thus it is no new problem for the profession, although we doubt that it has ever assumed the proportions which now confront us. "Justice delayed is justice denied", and regardless of the antiquity of the problem and the difficulties it presents, the courts and the bar must do everything possible to solve it.[2]

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[1] Perry S. Millar, Carl Baar, Judicial Administration in Canada, McGill-Queen's University Press (1981) at p. 195.

Trial delay and court backlog are in most instances not analyzed in isolation. They have become enveloped within the umbrella of caseflow management.[3] In an era in which public sector management has emerged as a respected discipline with a mandate to effectuate the design and delivery of well-performing cost-effective services to the public, caseflow management has emerged as a field in need of study in its own right.[4]

Caseflow Management As Crisis Management

Despite its modern day nomenclature, Millar and Baar are correct in pointing out that in application caseflow management has tended to function at a rudimentary level that consistently fails to develop and adhere to principles. In fact, it has tended to function primarily as a crisis management mechanism in court systems in general and the Ontario court system in particular. It is periodically resorted to as a stop-gap measure when court delay and case backlogs assume an alarming proportion and then placed back on the shelf when the fire is put out.

The Ministry of the Attorney General for the Province of Ontario's *White Paper on Courts Administration*[5], published in October, 1976, provides on excellent illustration of this state of affairs. A sub-title of the *White Paper* is *The Crisis Facing the Courts*. The crisis facing the courts in 1976 was summarized in the introduction: "Due to tremendous caseload increases over the last five years, there is genuine concern that the court system could be irreparably damaged unless significant steps are taken."[6]

> Why had trial backlog assumed crisis proportions? The *White Paper* states the case quite bluntly in terms that corroborate Millar and Baar's point about caseflow management lacking a principle-based approach in application.

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2 Gray v. Gray, 6 Ill. App. 2d at 578-579, 128 N.E. 2d (1955) at p.606.

3 Gretchen Pohlkamp, Caseflow Management - A Delay Reduction Tool, Background Studies to the System of Court Justice Task Force Report, Canadian Bar Association, 1995.

4 Gerald L. Gall, "Efficient Court Management." Papers of The Canadian Institute for the Administration of Justice, Toronto: Carswell, 1979.

5 Ontario Ministry of the Attorney General, White Paper on Court's Administration, Queen's Printer: Province of Ontario, (October 1976).

6 Ibid at p. 4.

> "While some of the difficulties experienced have resulted from a shortage of judicial manpower and inadequacy of resources, much of it is caused by the fundamental management weakness of dividing the overall authority for courts administration. This is reflected by an inability to develop effective caseflow management."[7]

In 1990, the Supreme Court of Canada rendered its landmark judgment in what has become known as the "Askov case".[8] That case invalidated a conviction against the accused on the grounds that an extremely long delay in bringing a criminal case to trial violated the accused's basic right to a trial within a reasonable time under the Canadian Charter of Rights and Freedoms. In rendering its decision, the Supreme Court set out basic guidelines for what would constitute reasonable time periods for having an accused's charge dealt with by the court.

The Askov decision brought the serious issue of the lack of caseflow management in the Ontario criminal justice system to a head. There were rumoured to be as many as 150,000 criminal charges which were in danger of being dismissed because they might fall outside of the guidelines prior to an actual trial. The Ministry of the Attorney General had been in the process of developing a caseflow management approach that was formally labelled as Criminal Caseflow Management.

In the midst of an outline of all of the emerging steps that were being taken to resolve the Askov crisis, the Ministry of Attorney General's *Report of Criminal Caseflow Management in Ontario* contains a statement which reads like a corroboration of the totally unsatisfactory state of affairs with respect to caseflow management mentioned in the 1976 *White Paper* by the same Ministry. "It has been established in other jurisdictions, that the infusion of additional resources without caseflow management techniques and an efficient management system in place is futile."[9] What an efficient management system entailed was a subject of considerable debate. However, there was at least recognition that court delay and backlog were systemic problems in need of a systemic remedy.

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7 Ibid at p. 5.
8 R.v. Askov et al (1991) 59 C.C.C. (3 d.) (S.C.C.) at 449.

Fourteen years after the clarion call for action of the 1976 *White Paper*, the Ontario criminal court system had still not moved beyond a crisis management approach to caseflow management. The "Askov imperative", rather than caseflow management principles, was thus able to become the latest "crisis" taking control of the criminal caseflow management program in Ontario.

And so it continues. In 1992, the Joint Committee on Court Reform tabled a report to the Attorney General on Ontario Court Administration that reads remarkably like the 1976 *White Paper*. In its introduction the report identifies what it labels as a number of problems. These are:

- Inherent conflicts in the administrative roles.
- Present management is crisis driven.
- Administration is inadequately funded.
- Administrative problems are preventing the timely processing of cases, creating delays and costs to the public.
- Defects in the present system are causing its participants to be frustrated and not to work optimally together.[10]

Twenty years after the publication of the 1976 *White Paper* readers of the Toronto newspaper, *The Globe and Mail* were greeted with the following banner headline on the front page of the February 23, 1996, issue: *Lawyers work for free to clear court backlog.*[11]

The newspaper article was commenting on developments related to *The Civil Litigation Task Force Final Report* done under the auspices of the Advocates Society, one of the team members of the 1992 Joint Committee on Court Reform's Report on Ontario Court Administration. A reading of the newspaper article and report provides a rendition of a state of affairs in the Ontario court system with respect to case backlog and the lack of caseflow management that, with all due respect to the good intentions of The Advocate's

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9 Nancy Dawson, "Drowning In Delay: Practical Aspects of Delay Reduction," in Criminal Caseflow Management In Ontario, Ministry of Attorney General, (July 1990).

10 Joint Committee on Court Reform Report On Ontario Court Administration, Submission to the Attorney General of Ontario by Advocates' Society, Canadian Bar Association, County of York Law Association, Criminal Lawyers Association, Law Society of Upper Canada. (unpublished), (June 30, 1992).

11 Kirk Makin "Lawyers work free to clear court backlog." The Globe and Mail. Toronto. PAI, (February 23, 1996).

Society investigative team, reads like a regurgitation of the 1976 *White Paper on Courts Administration.*[12] The court system in Ontario is still in a state of crisis. Lawyers are donating their professional time free of charge to work with judges to sort out a backlog of civil cases (criminal cases are also mentioned in the report) that is of crisis proportions. The Ministry of the Attorney General has failed to put the components of even a rudimentary caseflow management system in place to deal with the court backlog crisis according to the study.

The descriptor "rudimentary" is used advisedly. The following excerpts from the report, which are not isolated and capture its general tone, are illuminating. "To our surprise, accurate and uniform statistics were not available."[13] "The results; on a global basis were astonishing. In general and rough terms almost half the cases that were believed to constitute backlog were in fact cases that had been abandoned, settled or otherwise resolved and were being purged from the system."[14]

Millar and Baar are right. Caseflow management has been on the judicial administration agenda in Canada as a substantive topic for at least 20 years. In Ontario alone, it has a well-documented 20 year history as a topic that requires urgent attention in order to resolve a court backlog crisis. Yet the crisis continues and the task forces and study teams carry on.

What is the problem? Millar and Baar have pinpointed its root source by pointing out that the studies of court backlogs have tended to be individual case focused. In addition, they tend to be crisis management driven. The result is invariably a piecemeal solution that treats the symptoms rather than the disease.

What is stopping the Ministry of the Attorney General from designing and developing a comprehensive caseflow management system that is based on sound and valid principles?

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12 See 10 p. 5.
13 The Advocates Society, Civil Litigation Task Force Final Report, (December 1995) at p. 11.
14 Ibid at p. 11.

This chapter of the thesis will explore two possible reasons and suggest an approach that might lead to a long-term, effective solution. The first reason is that the adherents to caseflow management have achieved, at best, limited results with their efforts because of their tendency to rely on a single preferred solution, which will be labelled as conventional caseflow management, rather than the most effective solution to meet the relevant factors that constitute the situation at hand. The second is that the Ministry of the Attorney General may well be working diligently and in good faith in attempting to design and develop a workable caseflow management system, but it is doing so on the basis of a flawed set of principles. The principles are flawed on the basis of a misconception of the essential framework for successful Canadian caseflow management, in an attempt to force fit an American remedy into a Canadian problem that has a different dimension.

Conventional Caseflow Management

In a 1958 article in the *Indiana Law Journal,* Judge David Peck uttered the following musings that captured the emerging popular mood on the merits of applying management principles and theory to the administration of justice.

> The administration of justice is not a business in the sense of marketing - the machine made and mass produced; but it is a business in the very real sense of being affected in the quality, quantity, cost and delivery of its product by the same factors which make many businesses a success or a failure.[15]

Much of the management-oriented time and attention tended to be narrowly focused on the historical after-the-event study of court delay and trial backlog. A 1959 text by the team of Hans Zeisel, Harry Kalven Jr. and Bernard Buchholz is illustrative of both the nature and focus of the work that was done. The title of the text *Delay in the Court* [16] speaks for itself in identifying the terms of reference for the study, in this instance an examination of court delay in the Supreme Court of New York County (Manhattan). In

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15 David J. Peck, "Court Organization and Procedures to Meet the Needs of Modern Society," 33 Ind. :L.J. 182 (1958).
16 Hans Zeisel, Harry Kalven, Bernard Buchholz, Delay In The Court, University of Chicago Press, 1959.

an introductory summary review of the study, the authors set out what, in their opinion, were the germane factors affecting court delay that had the potential to provide remedies to the problem.

> The problem of remedies for delay therefore is the problem of a minority of cases that take up the overwhelming majority of judge time. In the large, there are only three ways of doing this and thereby reducing delay; the time required for the disposition of cases can be shortened; the number of cases requiring official disposition can be reduced by affecting the settlement ratio; or the amount of available judge time can be increased, either by directly adding judges or by increasing somehow the efficiency with which the current judge power is now used.[17]

The authors failed to state on what grounds they had come to the conclusion that these three factors represented the core problem or, more importantly, the certain basis for the solution to court delay. However, from the manner in which they are stated in the text there is no doubt that the authors believed that they were espousing the accepted general theory and principles on the subject.

Eighteen years later, Hans Zeisel published a second edition of the text. In the forward to the revised edition, he mentions that "the growing concern over delay has brought forth both research efforts and managerial reforms".[18] Delay is the driving force behind court management rather than a principled court management being the driving force behind delay reduction. To paraphrase the opening quotation from Millar and Baar: what to do about individual cases that are backlogged is the focus of court management rather than an attempt to develop a comprehensive set of principles that would define the discipline of caseflow management which could then be applied to reduce court delay.

The distinction between the two approaches is a critical one. If the focus remains on delay reduction rather than caseflow management as a discipline, caseflow management becomes conceptualized and utilized as a process whose terms of reference remain

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17 Ibid at p. 13.

18 Hans Zeisel, Harry Kalven, Bernard Buchholtz. Delay In The Courts, 2nd Ed. University Chicago Press, 1977.

encapsulated within a crisis context. This is not conducive to a rational planning and management approach to court administration. It is a remedy to be resorted to in the breach. Moreover, when resorted to as a remedy the focus of caseflow management becomes concentrated on the elimination of the symptoms rather than a management process which will yield solutions to a properly defined problem, thus limiting the potential for creative solutions.

Hans Zeisel indicates the degree to which caseflow management did in fact become so incapacitated. He recounts how, in the 18-year hiatus between the publication of his 1959 text and the 1977 second edition, very little substantive work on delay reduction has been done: Ironically this is a time span that is roughly equal to the 20-year period of time in Ontario, from 1976 to 1996, when the 1976 *White Paper* from the Attorney General initially put out a clarion call for the application of caseflow management to deal with Ontario's case backlog crisis.

To quote from Zeisel:

> In some ways, the aftermath of *Delay in The Court* has been disappointing. We intended to lay the analytic groundwork for research that would teach us how much, if any, court time a particular remedy makes available. We were envisaging research operations that would inform us, for instance, that under specific conditions replacing a central trial calendar by an individual calendar (which assigns cases at the time of filing for the judge who henceforth remains responsible for its disposition) reduces the required court time by, say, ten percent. That example, unfortunately, is fictitious; with one important exception no such figure has been reliably developed for any of the proposed delay remedies.[19]

Despite these musing of Hans Zeisel, there was no expression of any reservation on his part that perhaps the reason for the lack of dedicated research and analytical work on delay reduction was because it was a misstatement of the true source and nature of the discipline of caseflow management. Indeed, if one were to accept the basic framework for the initial work done by Zeisel, Kalven and Buchholz, a more appropriate label for caseflow management would be delay reduction or court backlog management.

However, that realization did not dawn on any of the principal parties involved with caseflow management, with the one important exception of the Thomas Church and Larry Sipes team, who were concluding a study on trial backlog at that time. Instead, caseflow management evolved as a discipline whose terms of reference became narrowly defined within the confines of the time and event control mechanisms used to alleviate court backlog and trial delay. Maureen Solomon and Douglas Somerlot are credited with stating what has become the generally accepted definition of caseflow management:

> As now generally accepted in the courts community, caseflow management connotes supervision or management of the time and events involved in the movement of a case through the court system from the point of initiation to disposition. In fact, caseflow management emphasizes early case management to achieve early disposition in the great majority of cases that ultimately will reach a non-trial disposition.[20]

It is important to note the proviso, "as now generally accepted" in their definition. It speaks volumes about what has become a fundamental problem that goes to the very root of caseflow management. As a management discipline it has been essentially shut down since its early inception and relegated to a delay reduction mechanism. In the process, it has not been allowed to embrace practices and techniques which would enable it to become a true discipline in its own right.

This is perhaps best illustrated by the failure of contemporary caseflow management to incorporate the concept of local legal culture based collaborative management into its terms of reference and methodology. The concept of collaborative management sensitive to the local legal culture and its association with caseflow management and trial delay reduction has evolved out of research directed by Thomas Church and Larry Sipes on trial delay in selected state courts during a two-year period from 1976 through 1978. The study was published in a short but seminal text with the title *Justice Delayed.*

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19 Ibid Foreward, "Eighteen Years Later" at p. 3.

20 Maureen Solomon and Douglas Somerlot, Caseflow Management in the Trial Court: Now and in the Future, (2nd ed) American Bar Association (1987) at p. 3.

Justice Delayed elevated a frequently mentioned finding from the study to the preeminent position of key concept. That key concept was local legal culture-based collaborative management. The study made frequent mention of the fact that it was the local legal system culture and collaborative partnering between stakeholders in the court that determined to a considerable degree the relative rate at which cases proceeded through the local court system. A hands-on judge who presided over a court in which lawyers were induced to cooperate in processing a case quickly and cost-effectively was the key to good caseflow management on the basis of the research in *Justice Delayed.* What made for good caseflow management was a local culture that creates an environment in which judges, court officials and lawyers representing clients found it in their best interests to work collaboratively in processing cases before the court in a manner that was expeditious and cost-effective.

The following excerpt from *Justice Delayed* provides a succinct statement of the central thesis put forward by Church that collaboration sensitive to the local legal culture holds the key to successful caseflow management.

> It is our conclusion that the speed of disposition of civil and criminal litigation in a court cannot be ascribed in any simple sense to the length of its backlog, any more than it can be explained by court size, caseload, or trial rate. Rather, both quantitative and qualitative data generated in this research strongly suggest that both speed and backlog are determined in large part by established expectations, practices and informal rules of behaviour of judges and attorneys. For want of a better term, we have called this cluster of related factors the "local legal culture". Court systems become adapted to a given pace of civil and criminal litigation. That pace has a court backlog of pending cases associated with it. It also has an accompanying backlog of open files in attorneys' offices. These expectations and practices together with court and attorney backlog, must be overcome in any successful attempt to increase the pace of litigation. Thus most structural and caseload variables fail to explain interjurisdictional differences in the pace of litigation. In addition, we can

> begin to understand the extraordinary resistance of court delay to remedies based on court resources or procedures.[21]

Ten years after the publication of *Justice Delayed*, Barry Mahoney, a consultant with the Institute of Court Management in Denver (an affiliate of the National Center for State Courts), directed a study of case processing time in 18 general jurisdiction trial courts in selected U.S. cities. The study utilized the same methodology as *Justice Delayed.* In the foreward Mahoney stated the following principle as the underlying foundation of effective caseflow management on the basis of *Justice Delayed* and his study:

> ... trial court delay is not inevitable. Early research *(Justice Delayed)* suggested that local legal culture largely determined the speed of case processing. However, now evidence reports that legal culture can be changed and that significant improvement is possible through careful application of management principles. That very encouraging conclusion emerges from this new study of case processing and court delay in 18 urban trial courts.[22]

Church and Mahoney appear to have uncovered and documented an important principle that can greatly contribute to and enhance the problem-solving capability of caseflow management. The proper identification of the stakeholders and factors that constitute the local legal culture and the careful application of collaborative management techniques sensitive to the local culture can reduce trial delays and court backlog.

Note that this approach to caseflow management does not eliminate the central proposition of conventional caseflow management that it "connotes supervision or management of the time and events involved in the movement of a case". What it does do is subordinate place, time and events in the mechanism category to be used as management techniques and tools if and to the extent they can reshape local legal culture in a manner that facilitates effective caseflow through the court system. Chapter 5 will outline with field work a case study that supports the Church-Mahoney proposition that proper

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21 Thomas Church Jr, Justice Delayed: The Pace of Litigation in Urban Trial Court, The National Center for State Courts (1978) at p. 37.

22 Barry Mahoney, Changing Times in Trial Courts, National Center for State Courts (1988) at p. 54.

identification of the local legal culture and collaborative management of the time and events by the requisite stakeholders within the context of that local legal culture promotes good caseflow through the provincial court system in Ontario. However, for the moment it is necessary to point out the reality of the framework of conventional caseflow management and what it has impeded in the way of good caseflow.

The criminal caseflow management program adopted by the Attorney General conforms to the conventional caseflow management model. To quote once again from the report, it was designed to conform to the Solomon-Somerlot framework.

> The fundamentals of caseflow management as listed in order, by the Institute for Court Management are:
>
> 1. Judicial leadership and commitment.
> 2. Consultation with the bar *et al.*
> 3. Time standards and operational goals.
> 4. Court supervision of case process.
> 5. An effective caseflow management system.
> 6. Accurate scheduling for trial date certainty.
> 7. Court supervision and control of continuances.[23]

None of the seven fundamental points refers even indirectly to the local culture criterion identified as a critical underlying principle by Church and Mahoney. It is noteworthy that the reference cited by Dawson[24] to substantiate her seven points are course materials utilized by the Institute for Court Management circa 1990 which are in turn derived from Maureen Solomon.

A follow up search of this source was made in conjunction with research for this thesis. The April 1990 materials were no longer available from the National Center for State Courts. However, the 1993-94 version, which was touted as being substantially the same as the 1990 set, was made available. A perusal of those materials in their entirety yielded no reference to the local legal culture concept but did advocate an approach and

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[23] See 9 at p. 7.
[24] See 9 Chapter 1.

techniques that adhere to the time and events criteria put forward by Maureen Solomon. There is a particular irony here in that the court used as a model is the Detroit Recorder's Court. It has a distinct local legal culture and utilizes collaborative management which might well account for the success it has had in that application. However, the Detroit Recorder's Court model is not examined within the context of local legal culture.

The end result of the Attorney General's caseflow management program, which follows the conventional caseflow management route, is the totally unsatisfactory state of affairs and ongoing court backlog crisis most recently documented for at least the fourth time in 20 years by the *1995 Civil Litigation Task Force Final Report*. In short, conventional caseflow management has not worked in Ontario to date and for the reasons outlined herein will not work in a management context given the fundamental flaw in its definition and terms of references.

The Canadian Caseflow Management Problem: Caseflow Management on the Basis of a Flawed Approach

The proposal for *Criminal Caseflow Management in Ontario* elucidated by Nancy Dawson in July of 1990 states that caseflow management begins with adherence to: "1. Judicial leadership and commitment".[25]

This position of the Institute for Court Management should not be surprising given the role that the judiciary plays in the administration of justice in the U.S. judicial system. To quote from a comparative evaluation of court administration in Canada and the United States by Carl Baar, "In American constitutional theory authority is divided: legislative, executive and judicial branches all have some authority that derives not from one another but from a constitutional document that confers powers and places limitations on each of them."[26]

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[25] See 9.

[26] Carl Baar, "Patterns and Strategies of Court Administration in Canada and the United States," 20 Canadian Public Administration (1977)at p. 244.

Given the preeminent position of the judiciary in the U.S. court system, it stands to reason that the Institute for Court Management and others would design a theory and set of principles for caseflow management that listed judicial leadership in implementation as the key component. Consequently, to the degree that conventional caseflow management has been successful in the U.S strong leadership from the judiciary has been an influential factor. Indeed, in his foreward to *Changing Times in Trial Courts*, which documented a study of caseflow management in 18 urban trial courts in the U.S., Mahoney noted that among characteristics for successful caseflow management "strong leadership" from the judiciary played an important role.[27]

The preceding section of this chapter pointed out the extent to which caseflow management in Ontario has been resorted to as a crisis management mechanism. In a characteristic crisis response mode, government officials in Canada have tended to look for convenient and short-term expedient mechanisms when court backlog crises have risen periodically over the past 20 years. The emphasis on expediency has in turn induced them to turn to the nearest and most easily accessible source for the mechanism, in this case American designed and administered caseflow management programs. The 1990 report on *Criminal Caseflow Management in Ontario* by Nancy Dawson is an excellent illustration of the extent to which the Attorney General bought into an accepted American conventional caseflow management program.

The fundamental problem with that approach, aside from being crisis management driven, is that the basic judicial administration structure in Canada cannot accommodate it. Conventional American caseflow management in Canada is a forced fit. It is either doomed to fail, or at best, provide a very limited short-term solution because of the fundamental differences in the manner in which judicial independence is defined in the two countries and the different ways in which their respective court systems are administered. Carl Baar provides a succinct statement on the nature and extent of these differences.

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[27] See 22 at p. 6.

> In the United States, court administration is in theory the preserve of a separate judicial branch of government, operating under legislative guidelines. In Canada, court administration is a responsibility of a minister of the crown, a cabinet officer and a member of the political executive. In the United States, court administration is generally directed and often performed by judges themselves. In Canada, judges have little or no control over court administration; it is directed and performed by public servants.[28]

Consequently, any attempt to implement a caseflow management program in the Ontario court system that is dependent upon strong judicial leadership as a priority consideration is arguably starting out facing an insurmountable institutional obstacle: limited judicial involvement in the administration of the court system. The Canadian judiciary has clearly indicated, when canvassed, that it does not envisage a substantive role for itself in the general administration of the courts, although it has become a tentative proponent of caseflow management programs.

Ian Greene, a political scientist at York University, surveyed the literature on this very subject area and polled a sample of judges in Ontario and Alberta for their opinions with respect to active judicial involvement in caseflow management. The following is a synopsis of his findings.

> According to the Ontario (1980) and Alberta (1984) surveys, two-thirds of the key groups in the courts, including the judges, were of the opinion that judicial independence does not give the judiciary the right to supervise caseflow management (see Table 1). The results of the Ontario survey alone were not significantly different from the combined Ontario and Alberta results. Most importantly, 85% of the respondents, including 87% of the judges, did not think that judicial independence gives the judiciary the right to supervise aspects of court administration other than caseflow. Zuber was aware of the generally cool attitude among Ontario judges and lawyers toward the Deschenes approach to judicial independence, and he referred to the Ontario survey for support.[29]

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[28] See 26 at p. 243.

[29] Ian Greene, "The Zuber Report and Court Management," Windsor Yearbook of Access to Justice, Vol. 8, 150 (1988) at p. 156.

The term judicial independence that Greene refers to is at the core of the different approaches taken toward court administration in Canada and the U.S. Judicial independence refers to the primary function of the judiciary to act as truly independent arbiters of disputes between opposing parties in a neutral forum or court. In the U.S., the judiciary has taken the position that the most effective way to assure its independence is to act autonomously and, within its constitutional terms of reference, control both the adjudication of disputes and the administration of the courts over which it presides. The Canadian judiciary has taken the opposite approach. In the Canadian framework judicial independence is best preserved by removing itself from the administration of justice and the control and supervision of administrative activities in the court system. Carl Baar has summarized the Canadian perspective on judicial independence as follows:

> On the other hand, the Canadian system of executive department administration, a product of parliamentary supremacy and cabinet responsibility, leads to an encapsulation strategy. Judges meet their maintenance and enhancement needs by emphasizing their distinctive responsibility for adjudication and separating themselves from executive-directed administrative activities.[30]
>
> The encapsulation strategy leaves judges with adjudicatory functions alone.[31]

That the American brand of conventional caseflow management cannot function effectively in Canada is not an isolated opinion being put forth in this thesis. It has been recognized in Ontario for at least 20 years, since the publication of the *White Paper on Courts Administration* in 1976 by the Attorney General, that conventional caseflow management is not a good fit with the present administrative structure of the Ontario court system. The following excerpts from the *White Paper* are instructive with respect to their criticism of the status quo separation of court administration and adjudicative functions.

> As a result of this divided control and lack of unified authority, the caseflow management project was largely unsuccessful. This was

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30 See 26 at p. 260.
31 See 26 at p 261.

> recognized by the Attorney General's Advisory Committee which, after lengthy discussion, unanimously decided that the responsibility for caseflow management should rest with the judiciary.
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> Effective court reform is impossible under the present structure of courts administration which divides the authority for courts administration between the judiciary and the Ministry of the Attorney General. Effective court reform requires a structure of courts administration which consolidates authority for caseflow management and the subsidiary administrative services under one unified authority. It is essential to recognize that effective caseflow management can only be achieved if those responsible for that management are responsible for and have control over the allocation of all resources necessary to implement caseflow control.
>
> Those responsible must not only be able to control administrative personnel and capital plant but must be able to allocate judicial officers and through them must be able to influence the actions of such participants in the court process as lawyers, police, jurors and witnesses.[32]

These excerpts have been inserted for a number of reasons that are important to the dominant themes of this chapter. First and foremost, they corroborate the argument that the conventional caseflow management model conceptualized and designed to respond to the American court system will not work in the existing Canadian and Ontario court systems. It should be mentioned that the caseflow management model that was used for experimental purposes in the fieldwork that comprised the *White Paper* investigation was the conventional American version.

Secondly, the general tone and thrust of the comments is to recommend that the Ontario court system and judiciary gravitate towards some form of pro-active management structure. Effective caseflow management will only evolve when the judiciary is in control of the factors and actors that make up the court system.

This line of thinking is in keeping with conventional caseflow management. However, it fails to recognize and give due regard to the collaborative management within local legal culture context that both Church and Mahoney found to be the key components of

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[32] See 5 at p. 6.

successful caseflow management applications in their respective studies. Given separation between the judicial and court administration functions in the Canadian system collaborative management is arguably the approach to caseflow management that has the potential to succeed. Ironically, the mindset of the *White Paper* is much disposed toward a highly centralized bureaucratic structure.

In this respect, the *White Paper* is feeding into the mindset of the traditional approach to court administration in Ontario that was present in 1976 and still exists today. The Ministry of the Attorney General was thinking in terms of big institutional approaches with control-oriented, centralized bureaucratic structures to deal with a systemic problem in justice administration.

In light of these positions it is understandable why so little has happened in the substantive development of caseflow management as a management discipline in Ontario over the past 20 years, and why the crisis in trial backlog continues. The Ministry of the Attorney General appears to be using a variation of attempting to force a round peg into a square hole.

The American conventional caseflow management model would not work in Ontario's justice system in 1976 so the Ministry blamed the justice system rather than the model. This was clearly an exercise in futility. The judiciary was well established and set in its ways in so far as its position on judicial independence was concerned. The references above to Carl Baar and Ian Greene point out conclusively from both a constitutional and political perspective that the Canadian judiciary in general, and the Ontario judiciary specifically, have not been prepared to become active in the courts administration field. They are predominantly adjudicators.

That is a position that is not going to change without direct government intervention, probably in the form of a constitutional restructuring of the judiciary, which was and appears to be highly unlikely. Indeed in the Askov case, Cory J., speaking for the majority

of the court, is clear and unequivocal in stating that the problems associated with trial delay are the responsibility of the government (in this case the Crown) and not the judiciary. These comments are representative of the Supreme Court of Canada's opinion on responsibility for trial delay in 1990, 14 years after the issue of the *White Paper*. "It is the Crown which is responsible for the provision of facilities and staff to see that accused persons are tried in a reasonable time."[33]

That position of the Supreme Court of Canada in 1990 appears to be consistent with the position of the Ontario judiciary as recently as 1992, at least at the Appeal Court level. In an examination of the disposition time for appeals in the Ontario Court of Appeal, Baar, Greene, Thomas and McCormick found the following approach to caseflow management by the judiciary. "Our analysis suggest that while the Court may be making every effort to accommodate those appeals which counsel want brought on quickly, it is doing little to advance those cases which counsel themselves are in no hurry to complete. Although in some cases such delays may neither threaten the standards of justice nor harm individual litigants, in other cases this laissez-faire approach of the judges may well have been unacceptable."[34]

This state of affairs had not gone completely unnoticed within the Ontario court system. In 1986 The Honourable Thomas Zuber of the Ontario Court of Appeal was commissioned by the Attorney General to examine the state of the Ontario court system. Mr. Justice Zuber confirmed the unacceptable nature of the status quo. However, he was also cognizant of the existing regulatory regime that encompassed the judiciary and court administration functions. Moreover, he was sensitive to the established and well entrenched notion of judicial independence in a Canadian context.

That being the case, he saw the potential for caseflow management through what he labelled as the "Partnership Approach To Managing Courts". The following excerpts will

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33 See 8 at p. 479

34 Carl Baar, Ian Green, Martin Thomas, Peter McCormick, "The Ontario Court of Appeal and Speedy Justice," Osgoode Hall Law Journal, Vol. 30,. 1992. 261 at p. 287.

illustrate that what Mr. Justice Zuber labelled as partnership is synonymous with the concept of collaborative management.

> The Partnership Approach to Managing the Courts
> It appears that neither the judiciary nor the executive can be in sole control of the courts, as each has its own sphere in which it must be the final authority in the making of decisions. This does not mean, however, that the judiciary should be excluded from input in areas for which the executive is responsible, or that the executive should be excluded from input in areas for which the judiciary is responsible.
> - - -
> This approach of a close working relationship and mutual consultation is the key to an efficient management system for operating the courts, where ultimate responsibility is divided. The importance of a co-operative spirit and of constantly open lines of communication between the judicial and administrative authorities cannot be overemphasized.
> - - -
> The approach favoured by this Inquiry is shared responsibility for the operation of the court system, with the judiciary having the final say on matters of assignment of judges, standards for judges' workloads, assignment of individual cases and the arrangement of a sitting schedule.[35]

According to Ian Greene, the impetus for this approach emerged out of a consensus among the stakeholders in Ontario's court systems "that [since] neither the executive centered nor the judge controlled model is optimum, a partnership approach, such as that recommended by Zuber, seems to be greatly favoured."[36] Greene points out that this recommendation, although unique and creative, was not without controversy. "The courts management committee approach, if implemented, would create a system of courts administration which knows no close equivalent in any other part of the world."[37] Unfortunately the courts management committees were to be regionally based rather than locally focused.

Baar proved to be a voice of prudent reason among a number of enthusiasts who felt they had finally come upon the solution to Ontario's court administration problem. The

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[35] The Honourable T.G. Zuber, Report of the Ontario Courts Inquiry, Queens' Printers for Ontario(1987) at p. 157.
[36] Ian Greene, "The Zuber Report and Court Management," Windsor Yearbook of Access to Justice, Vol. 8, 151 (1988) at p. 159.
[37] Ibid at p. 151.

following comments made by Baar in 1988 have proven to be on target in their prediction of how well established stakeholders in the court system would actually respond to a consensus-based court management team approach to caseflow management. The legal profession, given its entrenched status outlined in detail in chapter 1 of this thesis, was less than enthusiastic about a shift in court management that would affect its status. However, the following excerpt from his analysis of the Zuber Report's recommendations is far from pessimistic. It does contain a suggestion with respect to facilitating coordination that is compatible with Church and Mahoney's propositions that the collaborative management of the factors and actors that constitute the local legal culture of a particular court can create effective caseflow management.

> The benefits of effective caseflow management are unlikely to flow from the forced partnership of Zuber's regional management committees. Ministry officials are likely to feel that the committees would be dominated by the regional chief justice who would chair each one, and withhold support and cooperation. In turn, the judiciary would be likely to object to the fact that a majority of the members of the committees owe their appointments and tenure to the pleasure of the minister, and challenge the committees, legitimacy once they take initiatives in caseflow management that border on areas of ultimate judicial authority. The emphasis therefore should be less on forcing partnership and more on facilitating coordination. The benefits of the development of effective caseflow management by coordination of judiciary, bar and court administration are sufficiently great that the successes of those local courts that first move in this direction are likely to stimulate efforts in courts throughout the province. This development can occur within the existing framework of executive responsibility for court services, without extending judicial control to areas that current attorneys general and their officials want to keep for themselves, or infringing on judicial independence in areas where executive intervention would invoke criticism by the judiciary.[38]

In fact, immediately following this sober analysis of the *Zuber Report's* recommendation on joint court management committees, Baar goes on to provide an excellent critique of what the essentials of caseflow management are and the extent to which good caseflow management is dependent on a principled approach that entails some form of collaboration

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[38] Carl Baar, "The Zuber Report: The Decline and Fall of Court Reform in Ontario," Windsor Yearbook of Access to Justice, Vol. 8, 105 (1988) at p. 144.

sensitive to the local court environment and culture. In fact, what he elucidates in the following paragraph infers that effective caseflow management must incorporate some of the fundamentals of Japanese management that are now labelled under the broad umbrella of service quality management.

> Caseflow management in the courts is analogous in important respects to the kinds of production processes that have benefited from breaking down the separation of thinking and doing. The effectiveness of case processing in a trial court cannot be improved simply by setting down general policies and guidelines for caseflow management, or mandating the use of particular techniques such as pretrial conferences or status hearings. The hard part is making the principles and techniques work in a complex operating court, whether it is made up of two judges in a small town or thirty in a large metropolitan courthouse. For example, getting the "cooperation" of the bar will be an entirely different problem if the two judges in the small town court share similar philosophies of sentencing than if their approaches diverge sharply or unpredictably. Caseflow management in the courts focuses in part on ways in which trial coordinators can schedule cases so that counsel are prepared, the judge is ready, and the matter is concluded following fair and complete consideration. As procedures for doing this are progressively refined, elements of the process that become more mechanical or routinized (e.g. setting of dates for court appearances) can be done in ways that require less time of more highly-trained personnel whose time can be spent more effectively in other ways. In Japanese private sector management, a similar process occurs with the interaction of an operator and his machine; as the operator identifies routine tasks that can be transferred to the machine, that operator then takes on a role monitoring how effectively those tasks are performed. Similarly, just as the judiciary and court administration would be wise to consult the local bar about how caseflow management procedures could produce the degree of preparedness the court requires from counsel, Japanese firms are known to send their executives to meet with suppliers to help them organize their activities so that the supplier's inventory moves smoothly into the firm's production process. What is happening here is not a process of command and control, but a process of mutual adjustment.[39]

It is this process of collaboration which provides the key to an appropriate approach for caseflow management in Ontario. The next chapter will provide the reader with an outline of how the legal services paradigm has shifted to embrace the concept of collaboration

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39 Ibid at p. 146.

through the evolution of client centered legal services which are local culture focused. The evolution of client centered legal services has in turn stimulated the development of the independent paralegal in Ontario who has been successful in developing legal services in the Ontario Provincial Court system through a *de facto* application of caseflow management that is local legal culture focused.

Chapter Five

New Practice Directions: Caseflow Management Through Collaborative Management Sensitive to the Local Legal Culture

Introduction

The practice of law no longer drives the legal services marketplace. Client needs and preferences now determine the nature and extent of legal services. Clients are now demanding legal services that are client-centred.

The concepts of mutual adjustment and collaborative management suggest the existence and interplay of more than one actor. Moreover, they infer accommodation on the basis of some form of common ground or consensus that offers at least the potential for mutual benefit.

The previous chapter pointed out the extreme unlikelihood, indeed one might suggest impossibility, of caseflow management in Ontario functioning on the basis of collaborative management at the provincial level. There are already institutional impediments in place. In addition, at the provincial level the nature and structure of these institutional forces are more conducive to generating conflict as opposed to facilitating some form of mutual adjustment on the issue of caseflow management.

The previous chapter did indicate, however, the potential for caseflow management to succeed when it is based on the guiding principle that the key to effective caseflow lay in effecting mutually beneficial accommodations and working relationships, or collaboration, in the local legal culture. That was the situation that existed in the Provincial Court in Scarborough during fieldwork done on how independent paralegals were able to move motor vehicle offence cases cost-effectively and expeditiously through the court. A study of the court environment and interviews with a representative sample of people with cases in that court indicated that the public was being well served through

an orderly disposition of cases represented by one legal services provider, POINTTS Advisory Limited. This chapter will provide a detailed description of the dynamics of mutual adjustment in the new legal servies paradigm and its application to caseflow management in the Scarborough Provincial Court. In doing so it will demonstrate the potential for partnership between the public and private sector in caseflow management.

Case Study of an Independent Paralegal Services Provider

Why has one particular independent paralegal, POINTTS Advisory Limited, been successful? In the case of R.V. Lawrie and POINTTS Advisory Limited, Blair J. A. offered the following opinion after having extensively reviewed the trial record on the business operation and legal services provided by POINTTS to the public. "It is obvious from the business they have attracted that they are providing an unmet service to the public."[1]

In an interview, Brian Lawrie, the founder and Chief Executive Officer of POINTTS, corroborated the statement of Blair J.A. Indeed, he indicated that a key component of the defence in the above cited case was that all POINTTS was doing was responding to a message being sent out to the marketplace by the public.[2]

POINTTS Advisory Limited did not come about as a solution in search of a problem. Lawrie was at one time a member of the Metropolitan Toronto Police Force. He worked as a police constable in the Traffic Division for a number of years. In this capacity he was routinely assigned to make appearances in what became the Provincial Offences Court in 1980. He noticed that a significant number of defendants appearing in court were not represented by independent counsel. He also had the opportunity to observe that in many situations where defendants were represented by lawyers, they were not given adequate professional representation.

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1 R. v. Lawrie and POINTS Advisory Limited (1987) 32. C.C.C.549 (Ont. C.A.).

In general, he observed that most lawyers knew very little about the *Highway Traffic Act* or the *Provincial Offences Act,* the two statutes that constitute the source of most charges in Provincial Offences Court. They were not familiar with Provincial Offences Court procedure or court culture. The culture in particular tended to be informal and impromptu with an emphasis on disposing of a large number of charges in short order. Many of the lawyers tended to conduct themselves and their client's case as though the proceedings were in a higher court. In light of their lack of knowledge and/or preparation for a case, they were inclined to seek adjournments or engage in very elementary general jurisprudential reasoning as the basis for defending their client.

Within this milieu Lawrie recalled a number of recurring events that involved him in his capacity as a police officer. In some cases lawyers would approach him asking for advice on the legal technicalities of the charges and an interpretation of the statute in question. This should not be surprising given the nature of training provided to the legal profession as outlined in chapter 1 of this thesis. In many more cases, unrepresented defendants would approach him and seek the same advice. In the latter instances he took it upon himself to ask people why they were appearing without some sort of professional advice or counsel.

Their responses tended to echo the same themes. Lawyers were too expensive. They were not interested in appearing in Provincial Court. An initial consultation with a lawyer left them with the opinion that the lawyer was not well versed in the law relating to motor vehicle offences. Their lawyer was unable to appear in this court on the date in question because of a conflict in scheduling. The defendant, however, could not afford to take more than this one day off from work to deal with the charge.

He went on to query these defendants as to why they were approaching him, a police officer in uniform, for advice. Despite having been charged with a motor vehicle offence by a fellow constable, they believed that a constable in uniform would render good

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[2] The author has had an ongoing research relationship with Brian Lawrie over a 12-year period that commenced in the Fall of 1984. Much of the material that appears in this section reflects information gained through that relationship and Lawrie's willingness to share his ideas and opinions on the origin and evolution of POINTTS Advisory Limited.

impartial advice. More importantly, even if their trust had limitations, they were confused about the technicalities and process and concerned about the consequences of a conviction. They might lose their driver's licence and/or be faced with a hefty hike in their insurance premium if found guilty. Their way of life and perhaps livelihood could be adversely affected in a serious way.

In the marketplace, consumers send out messages or signals that they are in need of a certain type of service. This is what unrepresented clients were doing in Provincial Offences Court. They constituted a stakeholder group in the court system that was articulating a service need and requesting a type of service. Their stakeholder status within the court system was of an external nature. Their message was therefore being sent out to the external marketplace for goods and services. At this time there was no alternative legal services provider to respond to their message. The politics of paralegalism had been successful in keeping independent paralegals out of the court system. Hence, their query to a seemingly knowledgeable but internal source.

In the early 1980s then Police Constable Lawrie decided to respond to this signal. He left the police force and formed POINTTS Advisory Limited and began offering his professional services as an experienced former police officer on a fee-for-service basis to defendants in motor vehicle offences in Provincial Court. In the context of chapter 4 and its investigation into the potential for a local legal culture-oriented caseflow management system that encompassed a public sector / private sector partnership, what Lawrie did was respond to the dynamics of the local Provincial Court culture. He analyzed and evaluated the respective positions of the existing stakeholders in the Provincial Court system and recognized that the source of one of the problems was the absence of a cost-effective legal service provider for defendants required to appear before the court on *Highway Traffic Act* offences.

What Lawrie did was conduct what in service quality management terminology is known as a service needs determination. Lawrie did not say to himself, I am a police constable, and this is what I like to do, so how can I justify doing it? He instead immersed himself

in the local legal culture and listened to the voice of the marketplace as potential clients told him what they wanted. Instead of minimizing his ability to respond as a police constable, which was both valid and an ethical requirement in his official capacity, he made a decision to take advantage of an entrepreneurial opportunity and change his role from police constable to independent paralegal.

Service needs determination, as practised by POINTTS Advisory Limited, is based on the assumption that the starting point for effective service solution program development is to listen to the needs of the service community as expressed by potential clients. Do not assume that the existing service provider stakeholder base has the capability to provide the solution to a service problem. Rather than join a chorus of court administrators and lawyers who define the problem as a constant shortage of public courtrooms and funds to pay for lawyers to represent defendants, he went to the immediate potential client base, Toronto, and sought their opinions through a series of informal one-to-one solicitations at Provincial Court. He found the following:

1. Defendants believed motor vehicle offences to be a serious matter that had significant negative potential impact on their driving privileges and insurance rates. It was for this reason that they were prepared to go to court.

2. Defendants did not believe they had the legal knowledge or court related expertise to represent themselves effectively in a court appearance.

3. Defendants did not believe lawyers were the appropriate professionals to represent them in Provincial Offences Court.

4. Defendants were prepared to pay with their own personal funds for the services of a professional whom they believed had the requisite legal knowledge and expertise to represent them in Provincial Offences Court on a motor vehicle charge.

5. The defendants wanted a service that was price sensitive and bore some direct relationship to the cost of the negative potential consequence.

6. Defendants wanted a service that was location sensitive. They wanted to be able to access a legal service provider in close proximity to the court.

7. Defendants wanted a service that was time sensitive. They were not prepared to sacrifice more than one to two hours consultation time and one lost work day for court time to deal with a motor vehicle offence.

8. Defendants wanted a service that would minimize or even reduce delay. The great majority of defendants in motor vehicle offences were otherwise law-biding citizens who did not want the prolonged stress from having a legal charge "hanging over their head".

POINTTS responded to this service needs determination in conformance with the basic principles associated with service quality management. It realized that the consumer and potential client didn't just want legal advice. The consumer was looking for a value-added service that was legal services based. POINTTS thereupon set out not to compete with lawyers, who are for the most part in practice to render legal advice, but instead to render an alternative legal service that was based on delivering a value-added service to the client.

The essential components of the POINTTS value added service that evolved are as follows:

1. A mission driven corporation, that informs defendants in motor vehicle offences that POINTTS agents believed clients were involved in a serious legal issue that required professional attention and support.

2. A legal services organization that wants to provide a legal service for motor vehicle offences as opposed to the conventional law firm approach which has

traditionally displayed a negative attitude about motor vehicle offence representation.

3. An organization, staffed with former police constables with demonstrated legal knowledge and expertise in the disposition of motor vehicle offences in Provincial Court.

4. A legal service system that operates on the basis of a fixed price that is sensitive to the potential negative financial consequences of a conviction. For example, the fixed fee schedule for plea bargaining on a simple motor vehicle offence averages $450.00, which is roughly half of the insurance penalty faced by a defendant if there is no reduction in the 20km over, but less than 40km over the speed limit charge.

5. An operation that is location sensitive. Instead of one central office POINTTS established field offices. Each was staffed with one or two independent paralegals who were located in close proximity to Provincial Courts. A defendant had the opportunity to be conveniently serviced by a local representative.

6. Legal representation that is time sensitive. The fixed cost system of representation encouraged the independent paralegal to resolve the issue as quickly as possible, usually through plea bargaining in routine highway traffic offences such as speeding.

POINTTS Case Management Program

There are 27 POINTTS Offices throughout the Province of Ontario. They are strategically located beside court facilities. A person who wishes to become a POINTTS client is referred to the office closest to the court in which he or she is scheduled to appear by the centralized communications coordination centre. That person is given a

fixed quote for the suggested legal services with a qualified money-back guarantee if the service does not meet prescribed guidelines. There is a dual incentive for the court agent to provide legal services cost-effectively, in order to generate a profit from a fixed cost satisfactorily or risk losing the fee charged. Clients retain a POINTTS court agent as their court agent on that basis.

POINTTS is able to provide the legal services required cost-effectively on a profitable basis for three reasons:

1. First and foremost, its court agents are acknowledged fully qualified legal services providers in the fields of motor vehicle offences, provincial offences and summary conviction offences. There is no learning curve to go through. The POINTTS court agent knows the nature of the service needed and how to deliver it to the client's satisfaction in the minimum amount of time.

2. Second, there is, relatively speaking, very little downtime. The strategic location of the office *vis-à-vis* the courthouse enables the POINTTS court agent to minimize the amount of time not spent on hard core client services. POINTTS has taken its service base to the closest possible service contact point.

3. POINTTS court agents know the courts and the court systems in which they work. This is their dedicated specialty line of work. They have insider knowledge that comes from the close working system. They know how to get cases processed expeditiously. What they are doing at the provincial offences and summary conviction offences level is what lawyers who specialize in litigation and administrative law do at their respective courts and administrative tribunals.

When taking on a case, a POINTTS paralegal determines at the outset whether the main concern of the client is an insurance matter. If so, the client's service need is addressed as insurance premium protection. This translates into plea bargaining for a reduced charge and willingness to pay a fine in exchange for saving the court time and a guilty

plea. In the alternative, if the client service need is retention of a driver's licence then the POINTTS agent takes it on as a court case. The client is duly interviewed and prepared for a court hearing and the POINTTS agent deals with the provincial prosecutor much like a lawyer would in representing a client. However, the emphasis is again on plea bargaining if at all possible and a trial only if necessary to preserve the client's status as a licensed driver.

In a caseflow management context, what a POINTTS independent paralegal does is to implement a form of differentiated case management (DCM) that is client-focused from the initial interview. As the survey of former POINTTS clients that forms part of this thesis indicates, the great majority of defendants are concerned about one of two things: loss of their driver's licence privilege and/or a significant increase in their insurance premium. A conviction *per se* is not regarded as some form of negative social stigma or character blemish. Motor vehicle offenses, within reasonable limits, are regarded as folk crimes in the community that do not bring about shame or ostracization from one's family or peers. Everyone has a speeding ticket story they willingly trade on a *quid pro quo* basis at a social gathering in idle chat or banter.

The independent paralegal therefore obtains a recounting of the facts surrounding the charge, queries about the circumstances for potential mitigation (e.g., on an errand of mercy or responding to family emergency), and then zeros in on the potential ramifications. If the ticket or charge is technically deficient, that becomes the defence. If the charge is technically valid, the emphasis is placed on plea bargaining to mitigate negative ramifications for the driver's motor vehicle licence and insurance premium purposes. In the great majority of cases, clients are supportive of a plea negotiation or bargaining that will reduce the penalty, particularly if it will save them time and money. A small percentage, either because of a firm belief they are innocent and are determined to prove this is so, or because they will lose their driver's licence if convicted, insist on an actual trial.

With this client information on file the court agent then takes action. In some cases, particularly if the court agent knows the police constable or provincial prosecutor, telephone contacts are made. The court agent plea bargains for a lesser penalty that enables the police and Crown to make their legal point in the public interest while providing some sort of advantage to the defendant. Mutually agreed upon undertakings are exchanged, often verbally, which assure the police, Crown and court agent that this matter will be disposed of in 5 to 15 minutes in open court. It can therefore be easily put into a stack of a dozen or so other charges scheduled for that court day, knowing that it will be disposed of without delay. This can be particularly attractive to court officials with busy trial schedules, and to the court agent whose fee per case is low.

If personal circumstances or the dynamics do not allow for this precourt appearance contact, the court agent does appear with the defendant client in court on the date in question. The court agent thereupon introduces himself or herself to first the police constable and subsequently the provincial prosecutor. They are made politely aware of the fact that this defendant is in court today with professional legal support. They will put the Justice of the Peace, Provincial Prosecutor and police through the process of a full trial. In the alternative, there is the possibility of plea bargaining a mutually beneficial reduced penalty that will enable all parties concerned to accomplish their respective objectives.

The bargain is usually struck quickly, given the fact that almost all of the negotiators are seasoned veterans on the nuances of motor vehicle law and the Provincial Court system's judicial guidelines and minimum acceptable requirements. The savings in time for the institutional stakeholders as well as the court agent and client are significant. Instead of one case, a dozen or more are disposed of in one morning or day sitting. Significant revenue advantages accrue to the independent paralegal who may be acting on three to five of those, since as a rule the defendants in a local community all end up in the same court, are also significant.

What the author has just described here as a working illustration of effective caseflow management is substantiated as workable on a larger level by reference to another source. Church's 1978 study *Justice Delayed*, the pioneering work on the concept of local legal culture, recounts a series of strikingly similar scenarios. The one exception is that in the Church study, the legal representatives are all lawyers. What POINTTS has done using independent paralegals in a court with non-lawyer provincial prosecutors is what Church points out is necessary for smooth effective caseflow in a court system; work within the local court culture and institute dynamics that get all of the parties working together to make adjustments to dispose of cases in a manner that is mutually beneficial to all parties concerned within the confines and constraints of the law.

The POINTTS case management method is a practice known variously as "loading" or "dump trucking" in the conventional practice of law. It is a prohibited form of representation in legal aid criminal cases. The legal aid system operates on the premise that the client and lawyer have a relationship that requires the lawyer to dedicate their professional time and attention to only one client at a time.

In the past this has worked to the legal aid lawyer's advantage. When the legal aid fund was flush, they could schedule one case at a time in consecutive order and bill the plan for a minimum one or two hours per client. Five clients might require two days of court time even on routine guilty pleas and nominal sentencing representation.

This approach was neither an efficient use of a lawyer and client's time nor cost-effective. With the current financial crisis facing the legal aid system the government is in the process of forcing legal aid lawyers to adapt a variation of the POINTTS approach under the label of batching.

Ironically, in 1995 the author was retained by POINTTS to submit a proposal to the Attorney General that recommended a batching approach for disposition of legal aid certificate offences on summary conviction matters. Independent paralegals are

permitted by law to represent accused in the Ontario Court System on summary conviction offences. The proposed is attached as an appendix to this thesis.

Chart no. 4 in the proposal in the appendix indicates how it would have saved the Legal Aid Plan $10,000,000 per year. The same number of clients would have been served as was the case with the plan at that time. The one important difference was that legal aid clients would have been represented by independent paralegals instead of lawyers who were members of the Law Society of Upper Canada. The Attorney General declined even to respond to the request, let alone give it serious consideration. The politics of dealing with the Law Society, which was in a classic conflict of interest situation (at the time it administered both the legal aid fund and had sole discretion over who was eligible to receive certification as providers of legal services), was not a matter the Attorney General wished to confront.

In contrast to POINTTS, collaborative management approach that is sensitive to the local culture of this court, one can read the voluminous 1994 study, *Report of the Attorney General's Advisory Committee On Charge Screening, Disclosure, and Resolution Discussions*, chaired by the Honourable G. Arthur Martin. This 348-page tome documents the findings of a 15 member committee whose composition was as follows:

The Honourable G. Arthur Martin	1
Defence Bar (Two from outside Metropolitan Toronto)	4
Criminal Law Division (Two from outside Metropolitan Toronto)	4
Ministry of the Solicitor General	1
Representatives of the Police	3
RCMP	1
Federal Department of Justice	1
Total:	15

This report is a comprehensive, thoroughly researched jurisprudential rationale for a system that, through top-down induced charge screening, disclosure and plea bargaining will attempt to accomplish through the traditional government force-fit approach to caseflow management, what in effect is in place within the Provincial Court system through the interplay of stakeholders in the community interacting through the

marketplace. The Martin Committee contained no representatives from the general public, even though the impetus for striking the task force was to investigate a matter that was in the public interest. Neither did it contain representation from the independent paralegal community, even though at least one firm, POINTTS, is actively engaged in dispute resolution through the disclosure plea bargaining process for summary conviction criminal matters.

With all due respect to the learned status of the committee members and the truly impressive jurisprudential nature of the actual report, this is not indicative of the caseflow management model that is sensitive to and incorporates a community perspective or reflects the reality of a myriad of provincial local legal cultures.

Meanwhile, the community itself carries on with community-based solutions that are relevant to marketplace needs and requirements when given the opportunity to participate and formulate solutions to court problems, at least at the Provincial Offences Court level in the matter of motor vehicle offences.

In summation, it is important to keep in mind that no model and case study make for a perfect fit for either all offences or all courts. This is implied in the framework of local culture. However, the POINTTS case study does provide an excellent illustration of how, through application of caseflow management principles that are based a local legal culture approach, a provider of legal services can function in a manner that is cost-effective for all of the stakeholders and the client, while profitable for the private sector service provider and contribute to the reduction of court delay through speedy dispute resolution.

POINTTS: Customer Survey

The litmus test of whether a service is truly client centred and delivers a quality level of service is whether clients themselves value the service and believe it meets with their

expectations.[3] Creating customer satisfaction is the driving force at the core of quality management. The Treasury Board Secretariat's Quality Services Guide II: Measuring Client Satisfaction defines client satisfaction as follows:

> Client Satisfaction: The client's perception that the service provider's performance meets or exceeds his or her expectations.[4]

There are a number of indicators that can be utilized to measure client satisfaction. A client survey is one of the accepted indicators.[5]

When measuring for client satisfaction with a survey there are a range of performance indicators that should be incorporated in a questionnaire. Overall the general thrust of the indicators should attempt to measure the degree of client satisfaction in the context of receiving value for money spent.[6] Indicators such as a perception that the service provider was competent or very professional and the service itself was delivered cost-effectively to meet with expectations are deemed to be good measures of service quality.

In March 1994, the author conducted a client survey with a research assistant at a POINTTS Advisory Limited Office in Scarborough to measure client satisfaction. The Scarborough Office was chosen because it is typical of an established POINTTS franchise. It is located adjacent to a Provincial Court facility and at the time of the survey was staffed with two experienced court agents, one of whom who had been an original franchisee. The following analysis of the survey questions will demonstrate to the reader that the legal services provided by POINTTS Advisory Limited for highway traffic offences provide value to the client base it serves and in the process facilitates the creation of a value-added service. A copy of the survey questions and responses are included an appendix to this thesis.

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3 Treaury Board of Canada Secretariat, Quality Service, Guide II, (1995) at p. 1.
4 Ibid. at p. 1.
5 Ibid.
6 David Collier, The Service Quality Solution, Irwin Professional Publishing, 1994.

Question 1. Why POINTTS?

Clients are choosing POINTTS as their preferred court agent services provider because of its reputation. The company has become synonymous in the public arena as the court agent service that provides the highest level of quality service in Provincial Court appearances on highway traffic offences.

An impressive 99% of clients surveyed chose POINTTS because of its reputation. Note that it wasn't primarily because a POINTTS court agent was cheaper than a lawyer. The clientele wanted a value-added service and POINTTS Advisory Limited was perceived as the most capable organization with the capability to best provide it.

Question 2. Aware of other Agents?

This perception of POINTTS Advisory Limited as the preferred service provider on Provincial Court offences matters extends throughout the independent paralegal community. Although 50% of survey respondents were aware of other court agents they still ranked POINTTS Advisory Limited as their preferred court agent services provider in question 1.

Question 3. Consider Lawyer?

Only 15% of those who make use of the services of a POINTTS court agent would consider a lawyer as an alternative. This response is understandable when one reflects on the origin of POINTTS Advisory Limited. The organization was formed in response to a perceived need in the marketplace for an alternative to lawyers. The response to this survey question indicates the degree to which POINTTS Advisory Limited is a client centered service. An impressive 85% of clients see it as the preferred alternative to lawyers.

Question 4. Satisfaction with agent?

A key benchmark in the measurement of the quality of a professional service is customer satisfaction with the service provider. An impressive 96% of survey respondents are satisfied with the services provided by POINTTS Advisory Limited court agents.

Question 6. Satisfaction with general service?

Question 6 must be read in conjunction with question 4. In question 6 clients indicate that the level of satisfaction they felt relates to the service practices and is not wholly attributable to the professional capability of a particular court agent. POINTTS Advisory Limited has developed what in service quality management jargon is known as a customer benefit package (CBP). This CBP, which incorporates a comprehensive case management program, has delivered a satisfactory service to 95% of the client base, an impressive service quality indicator.

Question 7. Satisfied with court's decision?

POINTTS Advisory Limited has a CBP that completes the service loop. The client feels well served and also believes that the service produces results. An impressive 91% of the client base surveyed believed that they obtained a court decision through the service process that met with their expectations. Although the comprehensive service consists of other providers ranging from a provincial prosecutor to justice of the peace, it is the POINTTS agent who manages their case through the system.

Question 8. Driving record important?

Question 9. Insurance rates important?

These questions have been placed together because they go to the heart of POINTTS's case management program. Clients are retaining the services of agents because of an overriding concern about the implications to their driving licence and insurance rates from a highway traffic offence conviction rather than the implication of a conviction as such in its own right.

Clients are therefore prepared to have their court agent plea bargain their charge in a manner that will minimize their driving record and insurance rate penalties. The majority of clients do not feel the need to have their day in court. Moreover, as responses to question 12, wanted time delay and wanted to beat the system indicate, clients want POINTTS Advisory Limited to deal with matters quickly and cost-effectively. They are not retaining a court agent to delay matters but rather to expedite their case, albeit towards a decision that will minimize negative consequences to them. The case management program provided by POINTTS Advisory Limited delivers this type of service.

Question 11. Choose POINTTS again?

An impressive 93% of the clients surveyed would choose POINTTS again. Clients retained the services of POINTTS because of its reputation and remain believers in that reputation at the completion of the service. In a service quality context POINTTS Advisory Limited has matched client perceptions with client expectations. They have for all practical purposes, eliminated the service quality gap.

Questionnaire Synopsis

The POINTTS customer survey is a limited quality measurement tool. The sample size was small, one hundred former clients were surveyed. The telephone interviews were geared to solicit answers to a series of direct questions. There was a minimum of qualitative in depth exploration done on the service quality.

With those qualifications in mind the survey does provide some valuable initial information on the degree to which POINTTS Advisory Limited, a private sector legal services provider, is able to deliver a value added service to clients through a private sector case management program. It is definitely meeting the needs of the overwhelming number of clients it serves.

The questionnaire responses make a case for the merits of an in depth exploration by the Ministry of the Attorney General on the feasibility of formerly entering into a mutually beneficial collaborative partnership. POINTTS Advisory Limited has succeeded in demonstrating that the local legal culture approach to caseflow management is client-centred and effective in the Provincial Court in one of its locations that is representative of its service network.

Conclusion

This chapter has demonstrated that the court agent service provided by POINTTS Advisory Limited conforms to the basic principles of quality service being espoused for the public sector in the context of the new managerialism for the public sector. It has also demonstrated through the POINTTS customer survey that the legal service it provides are meeting client expectations. Clients are finding value for money in the service.

Chapter Six

Conclusion

Introduction

This thesis is based on the premise that a paradigm shift in the marketplace for legal services has created an opportunity for cost-effective and efficient caseflow management in the Ontario provincial court system. The proposed approach is a marked departure from what has been labelled conventional caseflow management. It envisages a collaborative partnership between provincial court judges, provincial prosecutors, court administrators and independent paralegals that reflects the local culture of the provincial court system. The purpose of this thesis has been, on the one hand, to demonstrate its feasibility and applicability to the present day system, and on the other hand, to elucidate the nature and extent of the politics that hinder its implementation.

The feasibility and applicability of this thesis has demonstrated both of these. This is an application of caseflow management that conforms to the local culture approach that was shown to be successful in Thomas Church's study *Justice Delayed*. Moreover, it respects the prevailing culture of judicial independence in Canada that has the judiciary playing a minimal management role. The independent paralegals, provincial prosecutors and court administrators regulate the flow of cases without impinging on the judge's authority to render an independent decision.

The caseflow management program profiled in this thesis fits the parameters of the collaborative public/private partnerships that are one of the preferred initiatives under the reinvention of government umbrella. Moreover, it is customer/client centered. The POINTTS customer survey indicates that the public feels satisfied with the form and content of its present operations.

The Politics of the Legal Profession

If this caseflow management program is so effective why isn't it in place or at least being referred to as a preferred model? The answer to that question is to be found in the extensive background provided on the legal profession in chapter 1 of this thesis. The legal profession has been able to elevate itself to the position of monopoly status in providing legal services. It has dominated the parameters and framework of the law and the court system. What is in the best interest of the legal profession tends to become the focus of what can or cannot be done in the field of court administration from the external stakeholder perspective.

This thesis has illustrated that point on several occasions by pointing out the predominance of lawyers and former lawyers (in their subsequent capacity as judges) on all of the various court administration task forces and royal commissions over the past 20 years. The nature of professional education in law entices these professional groups to take on an insular and proprietary approach in any investigation of court administration and caseflow management.

Independent paralegals are well positioned to be primary stakeholders in its delivery. They have the requisite expertise to deliver this routine legal service cost effectively . They are in close contact with the client base and connected into the provincial court network. They have a proven track record of actually providing a cost-effective and efficient case management system on a *de facto* basis. In the process, they are working with the institutional stakeholders in the provincial court system to implement effective caseflow management. In short it works well and would undoubtedly work better if it were given official recognition by the Attorney General.

Why then if it works so well on a *de facto* basis is it not being embraced by a Ministry of the Attorney General which routinely make solemn vows to fix the court system? The problem is that the court system is locked into a professional services paradigm that is the

exclusive domain of the formal legal profession under the auspices of the Law Society of Upper Canada. These two parties have demonstrated little, if any, inclination to include a broader spectrum of stakeholders in any form of meaningful decision making in caseflow management.

The legal profession is a powerful political force. Lawyers have proven themselves to be adept at influencing and/or coopting status quo authorities to give them substantial external influence on who gets to play a role in court proceedings. They have used that influence to carve out the court system as their exclusive domain.

The legal profession has been aided and abetted by the Ministry of the Attorney General which finds it both comfortable and convenient to have a profession with whom it has a direct affinity and familiarity to act as gatekeeper to the court system. It has enabled them to abdicate what might well be a substantive management responsibility.

The Paradigm Shift

The legal services paradigm which enabled the legal profession to gain its preeminent monopoly status as sole and exclusive legal service providers has shifted. Like all paradigm shifts it has been traumatic and chaotic. The status quo of 1948 is no longer acceptable to the public of 1998. The public wants to play a substantive role in the determination of the design and delivery of legal services. They are open to and interested in exploring alternatives. For routine legal matters, such as highway traffic offences, the public has indicated a preference for having a service role played by independent paralegals

The chapter in this thesis on the politics of paralegalism has illustrated the nature and degree to which both the public and a nucleus of members of the legal profession are becoming more assertive in their clarion call for admission of independent paralegals into the legal services mainstream. Using Kuhn's model of the paradigm and the dynamics of

a paradigm shift there is solid evidence that independent paralegals are emerging out of the margins and into the mainstream of the new marketplace for legal services.

The independent paralegal is here to stay in the provision of court agent services for highway traffic offences in the provincial court system. What remains to be done is for the Attorney General to give the independent paralegal the recognition and status that would enhance caseflow management capability.

The Politics of The Attorney General

The Ministry of the Attorney General is not cognizant of the *de facto* caseflow management system that currently exists in the provincial court system with respect to highway traffic offences, where independent paralegals like POINTTS are involved because the government is not yet prepared to open its eyes to the obvious and make the political paradigm. The chapters on caseflow management and the politics of the legal profession outlined the existence of a solidly entrenched relationship between the Ministry policymakers and the status quo legal profession.

It will take an act of considerable political will for the Attorney General to shift to a new court administration paradigm that is client-focused and includes independent paralegals. The Task Force on Paralegals tabled its final report to the Liberal government of Premier David Peterson in 1990. That report remained tabled with the NDP government for five years and remains tabled with the Progressive Conservative government of Premier Mike Harris at what is now the midpoint of its mandate. Talk goes on about the crisis in the court system and the need to improve access to justice, but no major changes take place. The same cast of characters table one more version of what is essentially the same brief to governments that give the same response.

The caseflow management system profiled in this thesis and shown to work is definitely a solution with a well defined niche in a known problem area. All of the necessary ingredients to make it work are in place and on a *de facto* basis working. What is now

needed to give it due recognition and legitimacy is an act of political will by the Attorney General for Ontario. Now that the paradigm has shifted, the question is no longer whether that act of political will might occur but when. The sooner it comes the less chaos there will be in the provincial court system. To the extent it continues to be delayed, the Ministry of the Attorney General risks increasing loss of public support for the public court system and further movement towards alternatives.

That this will occur is certainly the fact of the matter and not idle speculation. The public is clearly demonstrating its willingness to explore alternatives to a formal court system that is failing to respond adequately to its needs. The growth of non-court alternative dispute resolution (ADR) has been exponential in the past five years. In family law the Ontario Association of Family Law Mediators has grown from non-existent status to encompass 500 active mediators in less than ten years. Indicative of its success as an alternative to the practice of law is the emphasis that the Law Society of Upper Canada has placed on prosecuting mediators and ADR consultants for the unauthorized practice of law on-the-one-hand, and its introduction of ADR into its continuing legal education curriculum on-the-other-hand, in an effort to respond to public demand for a different type of legal service.

What this thesis demonstrates, by way of a case study of one segment of the court system, is that the judicial system is capable of responding to issues in a manner that is user-oriented and cost-effective. However, the status of this response is at present *de facto* in nature. To make it government policy and give it institutional legitimacy, the Ministry of the Attorney General must buy into innovative approaches to case management and caseflow management that go beyond the status quo. Court administrators and provincial prosecutors have demonstrated their willingness to work in a *de facto* collaborative partnership with independent paralegals to effectuate cost-effective caseflow management in highway traffic offences. But their efforts have yet to be given official political recognition.

What works for highway traffic offences in the provincial court system is an illustration of niche servicing that is responsive to local needs. This is not a blueprint for some form of universal application. In fact, the obsession with universal applications to the entire court system has been what has hindered progress in the development of cost-effective caseflow management in this province. Successive attorneys general have been coopted into embracing large status quo systems with their established main stakeholder group, the legal profession. In doing so, the government becomes entrapped within the present system and incapable of initiating the policy reforms that would legitimize innovative approaches to caseflow management that are niche-focused and local culture based.

There is a future and important role for public judicial forums in Ontario. They can play a valuable role if they are managed in a manner that is truly responsive to clearly articulated public needs. What is needed to enable that future to unfold is for the Attorney General to exercise the political will that resides in that office to allow court systems to move beyond the present system and embrace caseflow management that is local culture-focused and in tune with the principles of collaborative partnerships between public and private stakeholder groups in the court system. Independent paralegals are one of those stakeholder groups waiting to be embraced.

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POINTTS

Case Management Program Proposal
Ontario Legal Aid Plan
Summary Conviction Offences

" AID FOR LEGAL AID "

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EXECUTIVE SUMMARY

" It is obvious from the business they have attracted that they (POINTTS) are providing an unmet need for service to the public."

(Blair J. A. in the landmark 1987 Ontario Court of Appeal decision of R. v Lawrie and POINTTS Ltd.)

The Ontario Legal Aid Plan has a client service problem. It is unable to deliver cost effective legal services to clients with legal aid certificates.

POINTTS Advisory Limited, Ontario's leading court agent legal services provider, has a client centered solution. It has developed a proven case management program for the delivery of cost effective legal services to persons charged with summary conviction offences.

POINTTS is prepared to utilize its case management program to provide cost effective legal aid services to all persons in Ontario charged with summary conviction offences for a demonstration three year period for a guaranteed fixed cost.

This proposal will ensure that the public interest remains adequately protected in that the current level of service is maintained. It will further serve the public interest in providing a client centered legal service to persons charged with summary convictions offences in a cost effective manner.

The POINTTS case management proposal will maintain the existing levels of service while cutting costs by 33% per year over a three year period. The costs for providing court agent services to 43,779 clients charged with summary conviction offences will be cut from the current average cost per case of $685.00 to $450.00. This will reduce the total services bill for providing legal aid services for summary conviction offences form the current amount of $30,005,000.00 per year to $19,699,590.00 per year.

The POINTTS case management proposal will save the province $11 million per year and reduce the service costs in this category of offences by 33% per year for a three year period. The Province of Ontario will save $33 million while POINTTS delivers cost effective legal services to the same number of clients charged with summary conviction offences who qualified for legal aid certificates in the 1994-95 fiscal year.

The public interest will remain protected by guaranteeing a consistent level of legal services to the 43,779 legal aid clients who represent the 1994-95 baseline service year. The public interest will be served through cost effective legal services delivery that will save Ontario taxpayers $11 million per year for a total of $33 million over a three year period.

INTRODUCTION

A problem presents an opportunity for a solution. A solution provides an opportunity to explore alternatives. Alternative solutions often are the most effective means to resolve problems that are of such a serious nature that they are creating a chaotic situation of crisis proportions.

Problems become identifiable through the emergence of symptoms. A symptom is not the problem. It is merely an indicator of the nature and degree of the problem The elimination of the symptom will not in itself resolve the problem. It will only serve to shift the source of the problem to another venue.

The Ontario Legal Aid Plan has a serious problem. It has reached crisis proportions and is causing chaos within the legal aid service provider community. Moreover, because the Legal Aid Plan is a publicly funded program, the crisis has had a spillover effect to the Ministry of the Attorney General. The Law Society of Upper Canada, which has the dual responsibility of policy development and program delivery of the Legal Aid Plan, has drawn the Attorney General into the heart of the crisis creating a conflict situation between the Ministry and itself.

The true nature and extent of the problem is straightforward. The Ontario Legal Aid Plan is no longer capable of funding the provision of cost effective legal aid services exclusively through legal aid lawyers, who are members of the Law Society of Upper Canada, to members of the public who qualify for legal aid certificates. To put it in a public policy context, the Ontario Legal Aid Plan is no longer capable of utilizing limited public funds in a manner that protects the public interest of all Ontario residents who require publicly funded legal aid.

The fact that lawyers are not being paid the amount of money they maintain they need to practice law profitably within the parameters of the legal aid plan is not the problem. It is rather a symptom of a problem which has a much broader dimension. There has been a fundamental paradigm shift in the public policy terms of reference which now define the publicly acceptable parameters of the legal aid plan. The manner in which services are provided can no longer determine funding commitments. Limited funding capability is now requiring that services be designated and delivered in a cost effective manner. The conventional practice of law by lawyers can no longer be accommodated within the new paradigm.

Given the realities of the general fiscal restraints that face the Province of Ontario, two successive provincial governments, the NDP and Progressive Conservatives, have indicated that the Ontario Legal Aid Plan has reached the limits of its acceptable social spending envelope Another reality, that the present structure of the Plan itself and not fiscal restraint requirements is the problem, is beginning to be acknowledged by both the Attorney General of Ontario and The Law Society of Upper Canada.

The solution to the Ontario Legal Aid problem is not to focus on the money and attempt to develop mechanisms to reallocate financial resources to meet the demands of legal aid lawyers, at least not at the outset. This is merely a variation of arranging the proverbial deck chairs on the Titanic.

The solution instead lies in looking at the basic structure and framework of the plan. Determine why it is no longer able to meet its public interest mandate and deliver cost effective legal aid services to the qualified public with the public funds allotted to it for that specific purpose. Explore the potential to develop alternatives that will enable it to meet its primary public purpose, the provision of legal aid services, and not the compensation of legal aid lawyers. Restructure the Ontario Legal Aid Plan in a manner that will enable it to take advantage of these potential alternatives. Then financial resources can be allocated on the basis that will provide for cost effective legal aid services with public funds in the best interests of the public.

This introduction clearly indicates that

POINTTS, Ontario's leading provider of court agent services, is aware of the true nature and extent of the current problem with the Ontario Legal Aid Plan. It fully appreciates the extent to which the problem has a chaotic nature that has reached crisis proportions.

POINTTS has been aware for a number of years that the paradigm in which legal services are delivered to the public has shifted. There are a number of different ways in which legal services can be cost effectively provided to the public by different legal services providers. The practice of law by lawyers is one approach that works well in the appropriate situations. The delivery of client centered legal services properly insured by court agents is an alternative approach that also works well in appropriate situations.

In every field of law there is now a market for a range of legal services providers to deliver cost effective niche services. For example, criminal law is a field of law. However, there are two basic categories of offences; indictable and summary conviction offences. Lawyers, with formal law school training, are the most appropriate legal services providers in indictable offence matters, particularly if they are contested matters involving a complex trial. Court agents, with specialized skills based training through police work or community colleges, have proven themselves to be the most appropriate cost effective legal services providers in summary conviction offences matters.

Indeed, the Ontario Court of Appeal in the landmark case of R. v Lawrie and POINTTS Ltd. acknowledged the long standing legitimacy and role of court agents in doing just that when it judicially noted the following:

> "The Criminal Code since 1906 has permitted defendants to appear through agents in summary conviction proceedings."

The problem with the Ontario Legal Aid Plan is that its terms of reference and mode of operation fail to recognize the realities of the contemporary market for legal services. The Legal Aid Plan only recognizes one legal services provider, lawyers who are members of the Law Society of Upper Canada, as being eligible to provide legal services to members of the public who qualify for legal aid certificates.

Moreover, it only provides for the provision of these legal services through the conventional law practice mode. Individual lawyers are retained by legal aid clients on a case by case basis with legal services paid through open ended legal aid certificates. Within very rudimentary guidelines, the lawyer decides how much time to spend representing the client and then bills the legal aid plan accordingly. Ensuring sufficient billing revenue to the lawyer rather than focusing on providing cost effective service becomes the driving force behind the legal aid certificate.

POINTTS has a twofold solution to this two pronged problem.

- The first part of the solution is to make some relatively simple and straightforward changes to the Ontario Legal Aid Plan to allow for the most appropriate legal services provider to provide the requisite legal aid service to the client base. The most appropriate legal services providers in summary conviction offences matters are court agents.

- The second part of the solution is to shift the method of delivery of legal services from its present lawyer revenue focused mode to one that is cost effective service focused and client centered.

POINTTS has demonstrated expertise in providing cost effective legal services to clients through its client centered case management program. It is confident that it can maintain the existing level of legal services to all persons in Ontario charged with summary conviction offences for substantially less money than is the case at present. The Ontario Legal Aid Plan should enter into a province wide case management program agreement with POINTTS ena-

bling its court agents to provide cost effective legal aid services to all persons charged with summary conviction offences.

It is in the public interest of all Ontarians that public funds be spent in a manner that provides for cost effective delivery of public services to the greatest number of those eligible to participate in a public program or benefit from a public service. The POINTTS case management program proposal is in keeping with this stated goal and warrants having all parties concerned give due consideration to it on the basis of these criteria.

THE POINTTS CASE MANAGEMENT PROGRAM PROPOSAL FOR SUMMARY CONVICTION OFFENCES

The Ontario Legal Aid Plan provides legal aid certificates to qualified applicants charged with the following types of offences under the Criminal Code.

1. Indictable Offences
2. Summary Conviction Offences

The Legal Aid Plan issues legal aid certificates for persons charged under both categories. POINTTS is legally entitled to act as a court agent for persons charged with summary conviction offences.

Persons in need of legal aid apply for a legal aid certificate at local plan area offices. They are issued an open ended service legal aid certificate which requires them to retain the legal services of a lawyer who is a member of the Law Society of Upper Canada. Within rudimentary guidelines, that lawyer then determines how much time he or she needs to spend on the matter the client is charged with and processes the file. The Legal Aid Plan is billed on an hourly fee basis by the lawyer.

This approach to legal services delivery at the summary conviction level is neither efficient nor cost effective. There is no guarantee that the lawyer the client retains has any expertise in summary conviction law and legal procedure. In fact, most lawyers have at best a limited working knowledge of summary conviction offences law and procedure. Under the open ended legal aid certificate system the plan is in some instances being billed by a lawyer who is on a learning curve.

Neither is there any guarantee that the lawyer chosen is organized to provide a cost effective service. They may well be on the other side of town from the court. They may be operating in a manner that requires them to maintain a level of fixed costs and overhead that are not conducive to cost effective delivery of legal services on summary conviction offences.

POINTTS can eliminate these service deficiencies for summary conviction offences. POINTTS would like to become the exclusive legal services provider for all persons issued legal aid certificates from the Ontario Legal Aid Plan for summary conviction offences. It is prepared to commit itself to a fixed cost formula guaranteeing legal services for the present number of clients provided with legal aid certificates for summary conviction offences at a substantially reduced cost to the plan.

The Legal Aid Plan will know in advance every year what the total cost will be for providing legal aid services to a predetermined baseline number of persons charged with summary conviction offences. For an agreed upon in advance fixed case management program fee POINTTS will provide every person charged with a summary conviction offence who qualifies for a legal aid certificate with legal representation by a court agent.

POINTTS is able to deliver these sorts of efficiencies on service costs to clients because of the manner in which it provides its legal services. POINTTS delivers its legal services through a case management program specifically designed to provide for cost effective court agent

services for clients charged with provincial offences and summary conviction offences. It works in the following manner.

POINTTS Case Management Program

There are 27 POINTTS Offices throughout the Province of Ontario. They are strategically located beside court facilities. A person who wishes to become a POINTTS client is referred to the office closest to the court in which they are scheduled to appear by the communications coordination center. That person is given a fixed quote for the suggested legal services with a qualified money back guarantee if the service does not meet prescribed guidelines.

There is a dual incentive for the court agent to provide legal services cost effectively, in order to generate a profit from a fixed cost satisfactorily or risk losing the fee charged. Clients retain a POINTTS court agent as their court agent on that basis.

POINTTS is able to provide the legal services required cost effectively on a profitable basis for three reasons.

- First, and foremost, its court agents are acknowledged fully qualified legal services providers in the fields of motor vehicle offences, provincial offences and summary conviction offences. There is no learning curve to go through. The POINTTS court agent knows the nature of the service needed and how to deliver it to the client's satisfaction in the minimum amount of time.

- Second, there is, relatively speaking, very little downtime. The strategic location of the office vis-a-vis the courthouse enables the POINTTS court agent to minimize the amount of time not spent on hard core client services. POINTTS has taken its service base to the closest possible service contact point.

- POINTTS court agents know the courts and the court systems in which they work. This is their dedicated speciality line of work. They have the insider knowledge that comes from the close working association with a specific court system. They know how to get cases processed expeditiously. What they are doing at the provincial offences and summary conviction offences level is what lawyers who specialize in litigation and administrative law do at their respective courts and administrative tribunals.

The POINTTS Case Management Program Proposal

POINTTS is convinced that its case management program can bring the same type of client centered cost effective legal services to the Ontario Legal Aid Plan that it has implemented through its court agent services network to private fee paying clients. The POINTTS client survey, which is attached as an appendix to this report, will provide particulars on the effectiveness of that service from a client perspective.

For the 1994-95 fiscal year the Ontario Legal Plan issued legal aid certificates for 89,089 completed cases. Approximately, half of all these cases, 43,779, were summary conviction offences. Chart 1, at the end of this section, provides particulars.

POINTTS court agents are entitled by law to represent all of the 43,779 persons charged with summary conviction offences. Under the auspices of its 27 offices, to be supplemented accordingly to meet with legal aid plan service

requirements, POINTTS would assume sole and exclusive case management responsibility for all persons charged with summary conviction offences and assign one of its court agents to be their legal services provider for a fixed annual case management fee.

This type and level of accountability and efficiency of service is presently missing from the Ontario Legal Aid Plan. Lawyers get legal aid certificates which become open ended licences to bill the plan for the amount of hours they decide to spend on the cases. There is no incentive to be cost effective in the provision of the legal services. Indeed, stories abound of lawyers who use the plan as a revenue generation mechanism by overbilling and/or acting like "dump trucks" in the multiple billing of the plan for every hour worked.

Under its present case management program POINTTS knows on the basis of a proven track record through its province wide network of 27 court agent offices that it can provide high level client centered services cost effectively for fixed fees that range from $350 - $550 per case.

In comparison, an Ontario Legal Aid Plan lawyer charges an average $685.00 per case for providing a similar service. Chart 2, at the end of this section, provides an illustration of the differences between the mid-point range rate of a POINTTS court agent at $450.00 per case and a lawyer who is a member of the Law Society of Upper Canada.

Note the cost effective savings factor in favour of the POINTTS court agent of $235.00 per case and the cost effective reduction factor in favour of POINTTS of more than 33%.

On the basis of the 43,779 completed summary conviction offences handled by the Ontario Legal Aid Plan this would encompass the following billing range set out in Chart 3, at the end of this section.

POINTTS is prepared to accept 43,779 cases as a given summary conviction offences client base. It is willing to commit itself to providing court agent services to this number of legal aid clients each year for a three year period at its fixed mid-point client service fee of $450.00 per client.

In exchange for this client commitment, POINTTS is prepared to enter into a three year case management program agreement with the Ontario Legal Aid Plan to provide court agent services for 43,779 clients charged with summary conviction offences each year for an aggregate case management fee of $19,699,590.00 per year commencing April 1, 1996.

POINTTS would be prepared to accept the number of completed summary conviction offences for the Ontario Legal Aid Plan 1994-95 fiscal year as a base line. That base line contains 43,779 eligible candidates for legal aid certificates that POINTTS would guarantee court agent services for an agreed upon in advance lump sum fee.

Should the client service base exceed 43,779 legal aid clients in any given year during the duration of the case management program contract, POINTTS would guarantee service on the agreed upon per capita fee of $450.00 per case. Should the client service base decline significantly in any given year during the duration of the case management contract. POINTTS would agree to meet in good faith with the appropriate parties and negotiate an adjustment to the case management program fee for that given year.

This proposal is contingent upon the following conditions. If either the federal or provincial government make substantive changes to summary conviction offences law and procedure in that the fundamental nature of the court agent representation function changes significantly, the parties would agree to meet in good faith and review the terms of reference of the case management program contract. If a court should render a definitive judgment stipulating that client representation by a legal services provider was to be structured in a manner that significantly increased the nature of the service, the parties would agree to meet in good faith and review the terms of reference of the case management program contract. POINTTS has no

reason to believe that either of these contingencies is pending at the present time.

In addition, POINTTS would reserve the right to negotiate in good faith with the Legal Aid Plan the most effective means to provide court agent services to legal aid clients charged with summary conviction offences who reside in isolated remote communities that require exceptional service commitments. This would potentially involve an extremely small percentage of legal aid cases.

For the 1994-95 fiscal year the Ontario Legal Aid Plan paid out $30,005,000.00 to lawyers with legal aid certificates who serviced these 43,779 clients charged with summary conviction offences. The cost savings of entering into a summary conviction offences case management program exclusive services contract with POINTTS for the Ontario Legal Aid Plan is illustrated in Chart 4. The Legal Aid Plan will save a projected $11 million per year for a total of $33,000,000.00 over the three year contract period.

The POINTTS case management program proposal contains a number of attractive features that warrant it being given serious consideration.

1. Client services will be maintained at the 1994-95 level, commencing April 1, 1996, until the 1998-99 fiscal year end. There will be no cutbacks in client services for summary conviction offences cases.

2. There will be substantive cost savings in the provision of legal services for summary conviction offences. The province is requesting all public service providers to find ways to reduce service costs at between 10 - 20 % while developing innovative methods to maintain existing service levels. The POINTTS Case Management Program proposal surpasses these targets. It cuts service costs for summary conviction offences by more than 33% while maintaining the existing level of service. This 33% service cost cut will remain in effect for three years with no reduction in legal services to the public.

3. This $11 million annual savings in the summary conviction offences category will alleviate the pressure to cut funds in other areas of the Ontario Legal Aid Plan that may have difficulty meeting the necessary targets. This $11,000,000.00 is per year. Total cost savings to the province over the projected three year period will be $33 million ($33,000,000.00).

4. The POINTTS Case Management Program proposal will introduce a client centered and cost effective service approach to legal aid services that can service as a learning tool for the overall Ontario Legal Aid Plan.

Timing is critical given the current financial crisis. POINTTS is prepared to act on this proposal immediately. It has the expertise, present capability and support network in place to put its case management program in place for the Ontario Legal Aid plan as of the April 1, 1996, the coming fiscal year. It is in the public interest for the Attorney General and the Ontario Legal Aid Plan to act on this proposal forthwith.

CHART #1

POINTTS Case Management Proposal
Completed Criminal Cases
1994-95 Ontario Legal Aid Plan Fiscal Year

Case Type	Number	Percentage
1. Indictable Offences	45,310	51%
2. Summary Conviction Offences	**43,779**	**49%**
Total Criminal Cases Completed	89,089	100%

CHART #2

POINTTS Case Management Proposal
Average Cost of Legal Services Per Case
Summary Conviction Offences
1994-95 Ontario Legal Aid Plan Fiscal Year

Ontario Legal Aid Plan Lawyer	POINTTS Court Agent
$685.00	**$450.00**

Cost Effective Savings Factor in Favour of POINTTS is: **$235.00**

Cost Effective Reduction Factor in favour of POINTTS is: **33%**

CHART #3

POINTTS Fixed Case Management Proposal
Ontario Legal Aid Plan Billing Fee Proposal
Completed Summary Conviction Offences 1994-95

	Fixed Fee Low End	Fixed Fee Mid-point	Fixed Fee High End
Total Completed Summary Conviction Offences	43,779	**43,779**	43,779
Fixed Fee	$350.00	**$450.00**	$550.00
Total Case Management Billings	$15,322,650.	**$19,699,530.**	$24,078,23

POINTTS Mid-Range
Case Management Program
Fixed Cost Billing Fee Proposal

$19,699,530.00

Chart # 4

POINTTS ADVISORY CASE MANAGEMENT PROPOS
ONTARIO LEGAL AID PLAN
COST EFFECTIVE SAVINGS FACTOR COMPARATC

1996-1999

Current Cost For Processing Summary Conviction Cases	**$ 30,605,500.00**
POINTTS Case Management Service Cost Guarantee	**$ 19,699,530.00**
Annual Cost Effective Savings Factor To Legal Aid Plan with POINTTS Case Management	**$ 11,305,970.00**
Aggregate Cost Effective Savings Factor To Legal Aid Plan, 1996-1999	**$ 33,917,910.00**

Synopsis:

POINTTS will provide legal aid services to a potential 121,337 persons charged with summary conviction offences at a minimum savings of $33,917,910.00 in public funds than would be the case under the current delivery system over a three year period.

A Client Centered Service Approach to Legal Services

The present administrator of the Ontario Legal Aid Plan, the Law Society of Upper Canada, has adopted what can be labelled as a plan centered approach in providing legal aid services. In other words, this is our plan. How can it best be administered to protect the professional and financial status of the exclusive legal services provider group, members of the Law Society of Upper Canada, who depend on legal aid certificates to generate revenue for their law practices.

This is not intended to in any way imply or infer that the Law Society of Upper Canada is acting in a manner that is unprofessional or unethical. It is merely doing what any monopoly stakeholder does that is placed in the dual position of developing both the policy and terms of reference for a program or service and then given sole and exclusive control over the delivery of programs.

The public sector in general has recognized the inherent problems and, in some cases, conflicts of interests that arise when it assumes responsibility and control over policy development and program and services delivery. Gaebler and Osborne, two U.S. based public sector management consultants, have captured the inherent nature of the present government services problem and created the generally accepted buzz word for the solution in their widely acclaimed, text, Reinvention of Government. In the context of the *Reinvention of Government* that is emerging throughout North America and Europe, Gaebler and Osborne have equated with the development of public policy and delivery of government services with the analogy of *steering and rowing a boat.* The development of public policy, legislation, rules and guidelines represents the *steering* o the boat, or ship of state, in a given direction. The delivery of programs and services represents the *rowing* of the boat, the actual moving forward of the ship of state.

Governments have come to realize that in to many instances when the *steerer* and the *rower* ar one and the same a serious problem occurs. A government program takes on a life of its own th becomes intertwined with working for the best interests of the politicians and senior bureaucrats who are steering it, rather than the public it is intended to serve. Much of the current phenomenon associated with the reinvention of government is about separating the *steering and rowing* functions by breaking up government bureaucra and developing new public/private sector partne ships that are customer or client focused.

The Ontario Legal Aid Plan is caught in th worst kind of *steering and rowing* conundrum. The Ministry of the Attorney General has relinquished both the *steering and rowing* functions c a publicly funded legislative social services program to a private sector non-public body, the La Society of Upper Canada. The Law Society has assumed a quasi-government status in that the enabling legislation gives it the right to both develop legal aid policy, *steering*, and to adminis the disbursement of legal aid funds and the day day operations of the legal aid programs, *rowing* There is no effective on-line accountability between the Law Society and the government oth than on the matter of the annual request for government funding by the Law Society.

Given the propensity of the organization t has control of both the *steering and rowing* func tions to confuse the public interest with its own best interests, the Law Society has made a publ policy decision to administer the Legal Aid Pla and disburse legal aid funds solely for the bene of its own members, practising lawyers, to the exclusion of all other legal service providers. Fo example, POINTTS is authorized by law to ac court agents for persons charged with summar conviction offences. However, if a person requ legal aid to pay for their legal services they are

denied the opportunity to use the services of a court agent. The legal client is restricted to one group of legal services providers, members of the Law Society of Upper Canada.

It should therefore come as no surprise that in the current era of reinvention of government in Ontario, the Law Society of Upper Canada finds itself in a no-win situation in which it is developing no-win solutions that are primarily intended to benefit members of the Law Society at the expense of members of the public. Service to the public is decreasing in an effort to sustain the professional status and financial security of lawyers who depend on legal aid certificates to maintain their law practices.

This unsatisfactory state of affairs is a vicious circle that will only become worse rather than better from a public service perspective. Over time, increasingly fewer members of the public will be provided with legal aid services as an ever increasing proportion of money from a shrinking pool of funds is required to maintain the law practices of legal aid lawyers.

There is a different way to approach the current legal aid problem that provides an effective solution to the most important but ill considered stakeholder group to date, the public. By taking a *client centered* approach rather than the Law Society's plan centered perspective it becomes clear that there is a means of providing an increased level of service for the same amount of funds in prescribed service areas, or the same level of service for substantially less money.

A *Client Centered* Approach is based on the following steps:

A) SERVICE NEEDS IDENTIFICATION

B) SERVICE PROVIDER IDENTIFICATION

C) SERVICE DELIVERY MECHANISMS

D) SERVICE DELIVERY PROCESS

A) SERVICE NEEDS IDENTIFICATION

The annual reports for the Ontario Legal Aid Plan contains a comprehensive list that provides a break down of the basic type and nature of "Completed Cases by Type of Aid". POINTTS is a legal services provider with a well recognized high level of competency in acting as a court agent for persons charged with motor vehicle offences, various provincial offences and summary convictions offences. In light of its expertise this report will focus on summary conviction criminal cases.

For the moment, preliminary data for the current 1994-95 fiscal year show that there was a total of 89,089 completed criminal cases processed through legal aid certificates between April 1, 1994 and March 31, 1995. The breakdown of completed cases between summary conviction and indictable offences is as follows:

Summary Conviction Completed Cases
43,779
Indictable Offences Completed Cases
45,779
Total Criminal Offence Completed Cases
89,089

There is an almost even distribution between summary conviction and indictable offences in legal aid certificate work. The percentage breakdown is as follows:

Summary Conviction Completed Cases
49%
Indictable Offence Completed Cases
51%
Total Criminal Offence Completed Cases
100%

Approximately one out of every two members of the public who apply for criminal legal aid certificates has been charged with a summary conviction offence. There is a misconception in the general population that summary conviction offences are not as serious in nature as indictable

offences, given the relatively lighter penalties attached to summary conviction offence. However, a summary conviction offence charge is often an indicator of a special situation such as a first time offence or extenuating circumstances. It is imperative that people charged with summary conviction offences be entitled to due process that includes adequate legal representation.

The fact that 43,779 residents of Ontario felt it imperative to seek legal aid to retain counsel indicates the importance they attach to a summary conviction charge. Consequently, any efforts to cut back legal aid plan coverage should not limit in any way the ability of the public to receive legal aid certificates at this deemed acceptable level for summary conviction offences. It is in the public interest to maintain the existing level of service.

B) SERVICE PROVIDER IDENTIFICATION

The service needs determination analysis has determined that the legal aid plan is issuing legal aid certificates for both summary conviction and indictable offences. It is now necessary to determine who the most appropriate service provider is for legal aid clients with the two types of certificates.

Indictable offences are easily dealt with. The Law Society Act has restricted service provider status for indictable offences to lawyers who are members in good standing of the Law Society of Upper Canada. Many indictable offences are complex cases that require the type of legal expertise that lawyers acquire in law schools. Indeed, the law school curriculum is heavily weighted towards providing law students with the jurisprudential training to deal with substantive criminal law issues before superior courts. By training and the monopoly status granted to the Law Society of Upper Canada, lawyers are at present the only professional group entitled to represent legal aid clients charged with indictable offences.

When one looks at summary conviction offences from a service provider perspective there is not the same restriction. The Law Society does not have the same monopoly status to make arbitrary determination on who the legal services provider will be. The Ontario Court of Appeal has deemed it to be in the public interest to override the Law Society of Upper Canada monopoly status as legal services provider for summary conviction offences. In what has become known as the "POINTTS" decision the Ontario Court of Appeal unanimously ruled that independent paralegals could represent clients before all courts in Ontario on summary conviction matters.

To quote from Blair J.A. in Regina v Lawrie and POINTTS Ltd. (1987) 32 ccc (3d):

> "The Criminal code since 1906 has permitted defendants to appear through agents in summary conviction proceedings as is now provided in s. 735 (2) of the Code."

This enables the service provider identification analysis to be done using a public interest *client centered* service approach rather than a Law Society of Upper Canada perspective. Professor Herbert M. Kritzer, Professor of Political Science, University of Wisconsin-Madison has done extensive research into what the best criteria are in selecting the most appropriate legal services provider for clients in legal matters. His research is particularly informative in that it encompasses the U.S., Canada and England. It is noteworthy that court agents in Ontario have been specifically incorporated into his research.

On the basis of this research Professor Kritzer states the following informed opinion in the opening chapter of his soon to be published text The First Thing We Do, Let's Replace All The Lawyers: A Comparison of Lawyers and Nonlawyers as Advocates. "As will quickly become evident, the pattern I found is complex. One cannot make simple statements that lawyers are better than nonlawyers, or that nonlawyers are just as good (or better) than lawyers. The framework described above does provide a way of understanding the patterns."

The framework Professor Kritzer is referring to is reproduced below.

Dimensions of Advocacy Representation

I. Nature of Expertise
   A. formal training vs. insider knowledge
   B. generalist vs. specialist
   C. substantive vs. process

II. Representative-Client Relationship
   A. pre-existing vs. ad hoc
   B. broker vs. alter ego
   C. agency vs. fiduciary (delegate vs. trustee)

III. Accountability and Control
   A. "shareholder" vs. nonshareholder
   B. regulated vs. unregulated
   C. client-centered vs. forum-centered

The following analysis and evaluation of the dimensions of the advocacy representation model developed by Professor Kritzer will be utilized as the mechanism to illustrate who the most appropriate legal services provider is for summary conviction offence legal aid cases.

I. Nature of Expertise
A. formal training vs. insider knowledge

Lawyers, who are equipped with only a law school education and Law Society of Upper Canada bar admission course training, have a minimum amount of formal training in the law and legal procedure of summary conviction offences. POINTTS court agents have all received extensive hands on applied training in the law and legal procedure of summary conviction offences as former police officers.

In general, lawyers have no insider knowledge and practical expertise in summary conviction offences. POINTTS court agents have built their professional careers on expertise in provincial offences and summary conviction offences work. In fact, as verification on this point, Professor Kritzer uses court agents in Ontario as an example among all the countries he studied of how insider knowledge can result in high level professional advocacy. To quote: "In Ontario, as discussed above, independent paralegals regularly provide representation for traffic offenders in the traffic courts; these representatives effectiveness comes from their intimate knowledge of the process that derives from their prior experience as traffic officers protecting such cases in the same forums where they now appear as advocates for offenders."

I. Nature of Expertise
B. generalist vs. specialist

Lawyers are trained to be generalists. Whatever specialization they pursue training in does not include summary conviction offences, other than at the most basic peripheral level. POINTTS court agents are acknowledged specialists in summary conviction offences law and procedure.

I. Nature of Expertise
C. substantive vs. process

Lawyers know the basic theory and substantive principles of summary conviction law and procedures. POINTTS court agents have insider practical knowledge of how the process works at the summary conviction level.

II. Representative-Client Relationship
A. pre-existing vs. ad hoc

POINTTS Court agents are retained by clients because of their pre-existing knowledge of the court system and how to implement effective case management so that the client receives the maximum benefit for the minimum cost. The focus is on providing value added service to the clients.

Lawyers appear in court on summary conviction offences on an ad hoc basis and, with all due respect to the profession, it shows. A canvassing of provincial court judges and judges who routinely deal with summary conviction offences always produces criticism about lawyers who are ill

equipped to appear in lower courts on provincial offences and superior courts on summary conviction offences.

II. Representative-Client Relationship
B. broker vs. alter ego

To what extent is the legal services provider's primary commitment to getting the best result for the client in a cost effective manner as opposed to earning the maximum obtainable fee for themselves? Not surprisingly, Professor Kritzer, like many other researchers on the topic, has found that "under certain circumstances the hourly fee lawyer has an incentive to devote substantial time to a matter, the flat, fixed lawyer has an incentive to minimize the time devoted to a matter... "

POINTS court agents work on fixed fee arrangements with its clients. The client knows in advance what type of service will be provided for what price. A client service plan that is *client centered* is worked out in advance. The POINTTS court agent must then meet client expectations to retain the fee.

The degree to which legal aid lawyers are padding their legal aid bills through the hourly fee method has become a source of embarrassment to both the Ontario Legal Aid Plan and the Law Society of Upper Canada. The public is left to suffer from less money being available to provide a wider range of coverage and services.

I. Representative-Client Relationship
C. agency vs. fiduciary (delegate vs. trustee)

This factor pertains to the degree to which the legal services provider acts as the agent carrying out client instructions versus a fiduciary who uses specialized expertise to advance a client's best interest. Ironically, although lawyers are usually associated as the learned professional with the specialized expertise to serve the client's best interest, this is not usually the case at the lower court level. Clients choose POINTTS court agents for lower court representation because they are the de facto professionals who can act as true fiduciaries.

III. Accountability and Control
A. "shareholder" vs. non-shareholder

To what degree is the success of the legal services provider tied to the successful disposition of the client's case. POINTTS's success to date has been dependent on its ability to provide cost effective legal services to clients on a fee for value basis. It receives no government funding, nor are its clients subsidized. It has had to learn to deliver cost effective legal services in order to survive in a competitive marketplace. These are the types of financial accountability parameters needed in the Ontario Legal Aid Plan. POINTTS has a proven track record on delivering them.

To be frank and to the point, a primary factor influencing POINTTS decision to prepare an alternative to the current provisions of services to the Ontario Legal Aid Plan has been the consistent tendency of the Law Society to fail to identify itself as a shareholder for the client base of the plan, the public. The Law Society has relegated the public client base of the plan to a secondary status while it wages war on behalf of its members with the Attorney General. The rhetoric that envelopes that war has very little to do with the public interest and much to do with the maintenance of profitable law practices for lawyers.

POINTTS believes it is in the public interest that the public have legal services representatives who identify with the public as their primary shareholders. The nature and form of the POINTTS case management proposal will create that critical client-legal services provider linkage at the summary conviction offences level.

III. Accountability and Control
B. regulated and unregulated

This factor goes to the heart of what has been an ongoing dispute initiated by the Law Society of Upper Canada with POINTTS in its capacity as an unregulated court agent legal services provider.

For the record, POINTTS once again asserts it is supportive of professional and paraprofessional regulation. However, it has consistently opposed the efforts of the Law Society of Upper Canada to place itself in a position that permits it to be the monopoly provider of legal services to the public.

The public and public interest are best protected by a process in which a broad range of community based stakeholders have a voice in what type of legal services they want and are provided with the opportunity to choose from a range of qualified legal service providers. Numerous studies, including that of Professor Kritzer, provide conclusive evidence that in most fields of law there is now a range of qualified legal services providers severely restricted or prohibited in providing legal services to the public by law profession monopolies.

For the moment, because of the intransigence of the Law Society of Upper Canada, POINTTS operates on as an unregulated court agent services provider. Its continued prosperity and growth in the marketplace for legal services speaks for itself. The Law Society forces the public to use lawyers for prescribed services. No force, other than the guarantee of good service and client satisfaction, requires a member of the public to retain the legal services of POINTTS court agents. Yet they do consistently choose a POINTTS court agent as a cost affective value added legal services provider in appropriate circumstances over lawyers who are members of the Law Society of Upper Canada.

Substantive investigations and research studies conducted by everyone from the Ontario Court of Appeal, to the Task Force on Paralegals (The Ianni Report) to legal scholars such as Professor Deborah Rhode of Stanford University, political scientists such as Professor Kritzer and POINTTS itself all consistently come to the same irrevocable conclusion most recently summarized by Professor Kritzer:

> "As I discussed above, few complaints about lay representatives come from dissatisfied clients: almost all complaints come from licensed practitioners concerned about threats to their livelihood."

That is essentially the nature of the complaints emanating from the Law Society of Upper Canada about the government's current proposals for change to the Ontario Legal Aid Plan. Law Society members are concerned about their livelihood. POINTTS, an unregulated court agent legal services provider, is instead concerned about the potential loss of an essential service to the public and has come up with a *client centered* solution to solve at least part of the problem.

III. Accountability and Control

C. client-centered vs. forum-centered

POINTTS is *client-centered*. It must be to survive in the unregulated marketplace for legal services. It's approach to the current legal aid problem is *client centered*. It is designed to provide a continuum of services to the greatest number of people charged with summary conviction offences in a cost effective manner.

The Law Society is forum centered. Its primary concern is to protect the interests of its members and insure their economic well being through legal aid work.

B) SERVICE PROVIDER IDENTIFICATION SYNOPSIS

The results are clearly lopsided in favour of POINTTS as the preferable legal services provider. Professor Kritzer's analysis of other market niches for legal services produces similar results in favour of alternative legal service providers.

POINTTS isn't attempting to portray itself as somehow superior to members of the Law Society of Upper Canada when it comes to the provision of all legal services. It is the first to acknowledge that if the issue under study was serious indictable offences, the results would undoubtedly heavily favour criminal law lawyers over POINTTS court agents. However, the point that is clearly made by this analysis is that in the

skills specific area of motor vehicle, provincial offences and summary conviction offences, POINTTS court agents are high quality professional legal services providers who can provide a value added service to legal clients.

POINTTS does have demonstrated legal services provider capabilities that are more effective than the great majority of members of the law Society of Upper Canada on summary conviction offence cases. To date, POINTTS court agents have been denied the opportunity to demonstrate this to legal aid certificate holders. Because they have exclusive control for *"steering"* the Ontario Legal Aid Plan, the Law Society of Upper Canada has designated themselves as the exclusive "legal services providers" or *"rowers"* under the plan for summary conviction offences.

On the basis of the *client centered* approach for the provision of legal services and in the public interest this is a situation that should no longer continue.

C) SERVICE DELIVERY MECHANISMS

There are two basic approaches that can be taken to delive.ing legal aid to the public.

1. Inhouse Legal Services Provider - Public Defender
2. Judicare - Legal Aid Certificates

The inhouse legal services provider - public defender approach is the traditional bureaucratic model. A range of legal services providers are hired as salaried public servants. They act as public defenders for those in need of legal aid.

The Ontario Legal Aid Plan uses this approach to a very limited extent with its community clinics. There are community based research and advocacy centers scattered throughout the province that deal with specialized legal needs relevant to their location. Injured workers clinics, aboriginal issues clinics and landlord tenant clinics are examples of designations.

The clinics are a small part of the overall system. For the most part, the Ontario Legal Aid Plan has shied away from the bureaucratic model in favour of the Judicare model.

Under the judicare model the government sets legal aid program policy and eligibility criteria and provides the funding. Legal aid is delivered through private sector legal services providers who work for eligible clients who have been granted legal aid certificates.

The Ontario government has opted for the judicare approach. However, it is a publicly funded plan with a peculiar twist. A private sector body, the Law Society of Upper Canada which has no direct accountability to the public, has been given a quasi public status in that it has control and responsibility for the Legal Aid Plan. The legislation setting up the plan is public and the plan receives the bulk of its funding from public revenues. However, all facets of policy and program delivery are vested in the Law Society of Upper Canada.

The Law Society has chosen to exercise its unfettered control over the plan in a manner which primarily benefits members of the Law Society. Legal services provider status is restricted to members of the Law Society of Upper Canada. This is in spite of the fact that within the types of cases that qualify for legal aid coverage, summary conviction offences is a lawful practice area for court agents. Public funds have been utilized in a methodical and matter of fact manner by the Law Society of Upper Canada to favour one group of legal service providers, members of the Law Society, to the exclusion of all other legal services providers, including POINTTS court agents.

Moreover, the Law Society has permitted its members to provide legal services under the plan in a manner that benefits the traditional law practice mode instead of cost effective legal services delivery. Lawyers are presented with open ended legal aid certificates and bill clients at hourly rates over a period of time that is conducive to the lawyer maintaining their conventional law practice while creating a, relatively speaking, high cost per client case service.

For example, on the basis of 1994-95 data

from the Ontario Legal Aid Plan, the average lawyer's bill for legal services on a summary conviction case was $685.00. Using the Law Society hourly rate of $80.00 per hour, this translates into approximately 8 1/2 billable hours to process a summary conviction offence. This is a billable day's work.

By comparison, a POINTTS court agent, who works on the basis of a flat fee agreed upon in advance, charges a range of $350 - $550 per offence regardless of how many appearances are involved or how long the case might take. Through utilization of case management techniques and by bundling court appearances the POINTTS court agent is usually able to ensure that one provincial offence, motor vehicle offence or summary conviction offence never takes more than a half billable day. Consequently, a POINTTS court agent is able to deliver a comparable client service for a rate that is 25% - 45% less than that of a lawyer who receives a legal aid certificate from the Ontario Legal Aid Plan.

The following charts illustrate the comparison.

AVERAGE COST FOR PROCESSING A SUMMARY CONVICTION CASE

POINTTS Court Agent

$350.00 - $550.00

Lawyer Member of the Law Society of Upper Canada with a Legal Aid Certificate

$685.00

DOLLAR COST SAVINGS FACTOR IN FAVOUR OF POINTTS COURT AGENT

$135.00 - $335.00

COST EFFECTIVENESS FACTOR IN FAVOUR OF POINTTS COURT AGENT

25% - 45%

POINTTS has the appropriate service delivery mechanism in place to deliver cost effective legal services for summary conviction offences. It is entitled by law to provide court agent services for persons charged with summary conviction offences. It is in the public interest to have public funds utilized in a manner that results in the most cost effective service. The Ontario Legal Aid Plan should be restructured in a manner that will enable POINTTS to provide its *client centered* cost effective court agent services to persons charged with summary conviction offences.

D) SERVICE DELIVERY PROCESS

POINTTS has no desire to become one more party to qualify to provide legal aid certificates on an hourly fee basis along with lawyers. It is sincere in its statements that the present legal aid certificate system is neither cost efficient nor in the public interest. The primary purpose of public funds should be to provide for cost effective service to the public and not sustain the service provider.

The present government is doing the right thing in demanding that the Ontario Legal Aid Plan be restructured in a manner that recognzies

there is a shrinking amount of public money that must service a steady and perhaps growing client base. This is an application of the *Reinvention of Government* principle to publicly funded legal aid services.

The challenge for legal service providers is to reinvent the service delivery process. The Law Society of Upper Canada is not meeting the challenge. Rather than reinventing the service delivery process, it is in the early stages of embarking on a course of action that will see fewer members of the public provided with necessary legal services from public funds in order to sustain an outmoded service delivery process, the conventional practice of law by its members.

POINTTS has developed a case management program for delivering legal services to the public that provides a high quality level of service in a manner that is much more cost effective than the present Ontario Legal Aid Plan approach. This is not a theoretical model. It is a profitable court agent business with 27 offices and court agents strategically located throughout the province. This court agent business will generate an estimated $8,000,000.00 in legal services billings during the coming fiscal year.

POINTTS wants to join with the Attorney General and the Ontario Legal Aid Plan and provide a mechanism to Reinvent Government for legal aid services at the summary conviction offences level. POINTTS has the present professional services capability, the communications and branch office network, and infrastructure in place to delivery legal aid services to 43,779 members of the public throughout Ontario charged with summary conviction offences for a flat fee of $450.00 per legal aid certificate. POINTTS Advisory is prepared to enter into an exclusive province wide legal services case management program contract with the Ontario Legal Aid Plan to manage all summary conviction offences for a predetermined aggregate case management fee of $19,699,590.00 per year.

In an effort to provide the government with a level of assuredness that this is not a quick fix but the beginning of a permanent cost effective solution to a serious problem that has assumed crisis proportions, POINTTS will guarantee to sustain this level of performance for a three year period commencing April 1, 1996.

Given the nature of the crisis, time is of the essence. POINTTS has the service capability and the service delivery mechanism in place right now It is in the public's interest to redirect legal aid certificates for summary conviction offences through this service delivery process at the earliest opportunity, that being no later than April 1, 1996.

POINTTS AND CLIENT SATISFACTION

POINTTS is proposing to the Ministry of the Attorney General that it be awarded a legal services provider contract to implement its case management program for legal aid clients charged with summary conviction offences for the following two reasons.

1. **POINTTS can provide the best cost effective legal service for a publicly funded program in a field that is its specialization - summary conviction offences.**

2. **POINTTS provides a client centered service that clients value.**

POINTTS takes its ability to provide a *client centered* service that gives clients value for their money very seriously. In an otherwise unregulated market for court agent services the marketplace becomes the final judge of the quality of the legal services. If POINTTS does not satisfy its clients they will take their business elsewhere.

Being faced with the realities of a competitive market for services, POINTTS has had to build its client base by delivering a *client centered* service that was lacking within the established law practice community for representation of clients in court on motor vehicle offences, provincial offences and summary conviction offences.

The POINTTS case management approach to providing legal services to clients has been officially recognized by the Ontario Court of Appeal as being a value added service to the public since as far back as 1987, more than eight years ago. In the landmark case of R. v. Lawrie and POINTTS Ltd., which bestowed formal legal recognition for the provision of legal services by court agents for clients charged with summary conviction offences, Blair J.A. noted the following state of affairs with approval.

> **"It is obvious from the business they (POINTTS) have attracted that they are providing an unmet need for service to the public."**

This official legal recognition of court agents by the Ontario Court of Appeal raised concerns among the Law Society of Upper Canada and other interested parties. They expressed doubt about the ability of "unqualified persons, that is, persons not formally admitted to the practice of law by the Law Society of Upper Canada" to provide high level professional legal services to the public. In response to these concerns the then Attorney General Ian Scott appointed the Task Force on Paralegals (the Ianni Report) to look into the matter of the provision of legal services by independent paralegals. POINTTS, as Ontario's leading court agents services provider, was instrumental in task force proceedings and was also extensively analyzed in the course of the Ianni Report's investigations.

Like the Ontario Court of Appeal the Report of the Task Force on Paralegals (the Ianni Report) came to the following conclusions with respect to the level of professionalism of independent paralegals and the quality of service provided by them.

> **"On the whole, our research demonstrates that those who have used the services of independent paralegals are satisfied and even very satisfied with the services they received.**
>
> **.....**
>
> **Suffice it to say that even though independent paralegals are not now subject to any formal regulatory mechanism, most of their clients feel that they have re-**

ceived generally satisfactory service. We did not find a public hoodwinked by unscrupulous characters. Rather, we have found that the vast majority of independent paralegals are hardworking and committed to doing the best job they can. All of which explains why most clients appear to be satisfied with the overall quality of the services rendered."

Once again, the Law Society of Upper Canada took issue with the findings of the Ianni Report to the effect that independent paralegals were providing a high level of quality service to their clients. This was despite the fact that in examining the law Society's own files dealing with complaints about unauthorized practices by independent paralegals, the Ianni Report found almost no evidence of client dissatisfaction. The great majority of complaints were of a self-serving nature filed by members of the Law Society concerned about competition. To quote from the Ianni Task Force Report:

"Examination of 155 open files of the Law Society dealing with unauthorized practice reveals some clear trends. A great preponderance of complaints were made by lawyers rather than by consumers. Even if we recognize that an unsatisfied client of an independent paralegal may have subsequently sought the services of a lawyer who then registered a complaint with the Law Society, we have found that in the roughly three-year period (1986 to 1989) during which these complaints were made only 13% of them were initiated by clients of independent paralegals. On the other hand, 87% were initiated from among lawyers, government agencies, or the Law Society itself."

POINTTS has moved beyond the barrage of unsubstantiated complaints by the Law Society of Upper Canada. It has focused its time and attention on developing high quality *client centered* legal services with the intent of letting its clients be the judge of the level of satisfaction with those services. With that in mind POINTTS decided to open up its client files to an independent third party for a quality service review in the spring of 1994.

John G. Kelly, a law professor in the School of Legal and Public Administration at Seneca College, was given complete access to the client files in one of the POINTTS court agent offices. Professor Kelly utilized the services of a research assistant, Nelly Zoric-Kappos, to conduct a POINTTS Customer Survey. The terms of reference for the survey and a summary of procedures and the results are attached.

Refer to question 1, "Why POINTTS?".

Note that 99% of the clients chose the organization because of its reputation in the community as a specialized court agent.

Within the competitive marketplace for court agents, the responses to question 2 are particularly informative.

Even though 50% of the client base was aware of the existence of other court agents they still chose POINTTS as their preferred legal services provider.

The response to question 3 provides actual client verification of the findings of Professor Herbert M. Kritzer referred to earlier in this proposal.

In matters that concerned motor vehicle offences, provincial offences and summary conviction offences, 85% of POINTTS clients did not consider a lawyer. They saw a POINTTS court agent as their preferred legal

services provider.

Are POINTTS clients satisfied with the quality of the legal services they received? Questions 4 and 6 indicate they certainly are.

Approximately 80% of all actual clients expressed satisfaction with the POINTTS organization and the legal services they received from their court agent.

Finally, note question 11.

A phenomenally high 93% of clients actually serviced by POINTTS would choose a POINTTS court agent again as their preferred legal services provider. This is assuredly the ultimate litmus test of confidence in the level of the quality of legal services provided to clients.

There is no question that the POINTTS proposal to the Ministry of The Attorney General for a Case Management Program for legal aid services on summary conviction offences represents a dramatic departure from the current approach. In doing so it is recommending that an alternative legal services provider, a specialized court agent legal services firm, replace members of the Law Society of Upper Canada as the designated legal services provider.

In the past the Law Society of Upper Canada has not reacted favourably to what it takes as intrusions into its exclusive domains. It has consistently responded with unfounded claims about the quality of the reputation and/or the level of service of the alternative service provider, particularly if it is a court agent.

POINTTS has attached this profile on client satisfaction to its proposal in an effort to have consideration of its proposal considered on the basis of its merits. In doing so it intends to eliminate the potential for spurious argument and focus the attention of all parties concerned on the core issue of providing for the allocation of public funds in a manner that is in the best interests of the public.

Client Satisfaction Assurance Through Insurance

POINTTS recognizes the potential for clients to suffer serious harm if they are provided with a legal service that fails to meet with prescribed legal standards. It has initiated a comprehensive risk management scheme within its case management program to protect the clients it services.

The first step in risk management is to eliminate, or at least minimize, the potential for a lapse in legal standards. POINTTS hires court agents who have already qualified themselves as experts in provincial offences and summary conviction offences from their extensive background in police work. Court agents are then required to participate in ongoing professional development. If POINTTS is given the opportunity to implement its case management program with the Ontario Legal Aid Plan it will expand its professional development to encompass the legal aid factor.

The fallback step in risk management is to have sufficient insurance in place to compensate clients who might become entitled to a monetary damage award for the lack of due care and diligence in the provision of legal services. POINTTS does have in place comprehensive errors and omissions insurance to take care of potential damages claim, of which none has been filed to date.

Given the nature of this proposal POINTTS wishes to assure the Attorney General that there will at all times be adequate errors and omissions insurance in place to provide sufficient legal damages protection to clients should some unforeseen mishap occur. This places POINTTS on par with members of the Law Society of Upper Canada who often hold themselves out as the only legal services providers with an insurance support mechanism to compensate the public with damages for deficiencies in legal services.

POINTTS AND THE ONTARIO LEGAL AID PLAN

The Ontario Legal Aid Plan is a public service program under the auspices of the Legal Aid Act. S. 2 of the act empowers the Law Society of Upper Canada to administer a legal aid plan that conforms with the purposes set out in the statute.

Those purposes are relatively straightforward. The Law Society is empowered to establish and maintain a Legal Aid Fund. Money from the fund is to be utilized for three basic purposes.

1. **The establishment of a legal aid certificate administration system.**

2. **The issuance of legal aid certificates to qualified persons.**

3. **The setting up of a legal aid fund to administer both the receipt of legal aid money from the Province of Ontario and other sources and to the disbursement of funds to legal services providers who take on legal aid certificate holders as clients.**

The POINTS Case Management Program Proposal would not unduly interfere with the prevailing principles or purposes of the Legal Aid Act or the Ontario Legal Aid Plan. Persons charged with summary conviction offences would continue to go through the same process to qualify for legal aid certificates. The local area offices would administer the issuance of certificates and payment of legal aid fees as is now the case.

The principal difference, which would work in the Plan's favour, would be a simplified administrative process. There would no longer be any need for the administrative offices to scrutinize and/or audit legal aid bills. Every summary conviction offences legal aid certificate issued would be for a flat fee and referred to a POINTTS court agent.

The POINTTS case management program proposal would help to reduce operating costs for the Ontario Legal Aid Plan. For the 1993-94 fiscal year administrative expenses for the Plan were approximately $27,000,000.00 of which summary conviction offences represent in the vicinity of 10% of total fund expenses. Although there is certainly no direct correlation between monies allocated for legal aid certificates and administrative expenses it is reasonable to project a savings in administrative costs of $1,000,000.00 per year from POINTTS case management program. Over the projected three year case management contract term the Ontario Legal Aid Plan might well be able to cut administrative expenses by $2 million to $3 million.

There is only one statutory obstacle in the Legal Aid Act that would need to be changed to accommodate the POINTTS case management proposal. The act presently restricts payment of legal aid monies to barristers and solicitors who are members of the Law Society of Upper Canada. Minor amendments to these sections of the act to include court agents as well would enable legal aid funds to be paid to POINTTS court agents.

The Legal Aid Act does provide for an advisory council to oversee its operations. In light of the role POINTTS will play in the administration of the Legal Aid Plan through its case management program it would be in order for the Attorney General to exercise his direction under s. 9 (1)(C) of the act and appoint two of POINTTS designates as members of the advisory committee.

POINTTS is most interested in working constructively with the present advisory committee members and administrators of the Ontario Legal Aid Plan to improve operations.

POINTTS:

CUSTOMER SURVEY

MARCH, 1994

NELLY ZORIC-KAPPOS

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INTRODUCTION

During the month of March, 1994, a customer survey was conducted at the POINTTS office at Eglinton and Warden Avenues in Scarborough.

The purpose of the survey was to obtain general information on the public's perception of paralegals/agents in the traffic ticket sector, with specific focus on the POINTTS franchise.

The survey involved a total of 200 files, independently culled by the researcher. Files utilized were the most recent; completed with disposition noted. With two agents in the office, 100 files were taken from each agent: Ben Kouwenhoven, Agent A; Larry Fraser, Agent B.

A pro-forma letter was mailed to each client outlining the survey and requesting their confidential co-operation. As an incentive, a 20% discount was offered within a 6 month period on presentation of the letter should they require the services of an agent. (Appendix A)

The researcher then attempted to contact each client by telephone. A series of prepared questions was asked. (Appendix

B) Answers were individually recorded and grouped by agent, although, for statistical purposes, results were grouped together as no significant individual differences were evident. A total of 74 clients were actually contacted.

Results were collated and conclusions were drawn based on the data. Every attempt has been made to calculate and ultimately report in percentages to provide the reader with a view of the universe versus the sample.

The general observations and perceptions of the researcher are included to provide the reader with a full overview of the strengths and weaknesses inherent in this type of specialized franchise. In summary, recommendations are outlined.

It should be noted that the researcher spent three weeks observing and interviewing POINTTS agents, independent agents, crown prosecutors and justices of the peace in the traffic court system. Field notes are not included in appendices but are available for authorized perusal due to their confidential nature.

Nelly Zoric-Kappos

17 April, 1994

STATISTICS

		Number	%
1. why POINTTS?	reputation, specialization	73	99
	CAA discount	1	1
sub-factors (not all responded)	cost/cheaper than lawyer	9	12
	recommended by officer	3	4
	fear of doing it alone	10	14
2. aware of other agents?	yes	37	50
	no	37	50
3. consider lawyer?	yes	11	15
	no	63	85
sub-factors (not all responded)	no, too expensive	14	
	no, not specialized	33	

		Number	%
	yes, offence serious	8	
4. satisfaction with agent?	excellent	60	81
	good	11	15
	poor	3	4
5. know agent is ex-policeman?	yes	27	37
	no	47	63
sub-factor, if yes, effect decision?	yes	12	44% (of 27)
	no	15	56% (of 27)
6. satisfaction with general service?	excellent	57	77
	good	13	18
	poor	4	5
7. satisfied with court's decision?	very	47	64

		Number	%
	satisfied	20	27
	unsatisfactory	7	9
8. driving record important?	yes	49	66
	no	25	34
9. insurance rates important?	yes	48	65
	no	26	35
10. service fees?	very expensive	25	34
	reasonable	28	38
	inexpensive	21	28
11. choose POINTTS again?	yes	69	93
	no	5	7
12. other comments:			
think agent is a lawyer		3	4

		Number	%
wanted time delay		7	9
wanted to beat the system		8	11
wanted justice, wrong charge		4	5
wanted fee reduction if no success		6	8

HIGHLIGHTS

POINTTS has become a generic name synonymous with the defence of traffic ticket violations. The study revealed and supported this claim to the extent that 99% of all respondents stated they chose POINTTS to represent them because of their reputation, especially as it pertains to specialization in the traffic ticket area. Thus, the name POINTTS has household significance and commonality as does Kleenex and Xerox.

Awareness of other agents/paralegals offering traffic ticket services was divided equally; 50% were aware of other agents and 50% were not. More than likely, if this survey was conducted after the heyday of the POINTTS decision in the late 80's, the figures would be slanted towards no awareness of other agents. This introduces a need for advertising and community involvement as the POINTTS name has lost <u>exclusivity</u>. The free advertising provided by the media during the POINTTS court battle is now over.

Using the services of a lawyer for the defence of a traffic violation was not even considered by 85% of all respondents with 33% stating that lawyers do not have the specialization that POINTTS agents have and 14% stating that it would be

prohibitively expensive. Only 8% stated that they would consider using a lawyer if the offence were more serious such as impaired driving. This mindset of the POINTTS' client base shows significant inroads can be made in the area of the defence of summary violations.

With regard to the experience and service levels of individual agents, 96% of respondents reported agents were good to excellent. Of particular significance is that within this category 81% stated excellent levels of service were received and that their particular agent was extremely knowledgable and experienced. Customer perception levels are appreciably high and it is argued appreciably higher than the industry norm, especially with regard to independent agents that indeed enjoy the converse of the laudable POINTTS reputation. This important fact should be capitalized on in any proposed marketing plan.

Mr. Lawrie, president and founder of POINTTS, utilized the fact that all franchisees are ex-policemen during the initial start-up of POINTTS. Consequently, the finding that only 37% of all respondents were aware of this fact is surprising. Even more surprising is that of these 37% less than half stated that it was a factor in their decision in choosing POINTTS to represent them. This finding further supports the contention that POINTTS has become a household phenomenon and marketing plans should emphasize specialization levels of agents not past occupation.

We are looking at the classic 80/20 rule; 80% of resources are being directed on the perceptions of only 20% of the client base while only 20% of resources are being directed to the concerns of the majority client base, 80%, which needs continual feedback with respect to specialization levels for reinforcement purposes.

General overall office service levels are perceived by respondents to be good to excellent in 95% of all cases and are consistent with agent service levels.

Final results, the court's verdict on the violation, had 95% of all respondents satisfied to very satisfied with the outcome. In this respect the 8% who felt that a refund of the partial fee should be returned if unsuccessful is irrelevant. However, based on the significantly successful track record of "wins" in the POINTTS system, a formal partial refund could be offered as an incentive to prospective clients and be utilized as an additional selling feature for agents enabling them to better close the deal. Agents are currently using this technique on a informal and selective basis.

The POINTTS client base is significantly divided with respect to insurance and driving record concerns. Those who are employed in a capacity requiring "clean" drivers' licences are very concerned with points, 66%, and are not as concerned with insurance costs as they are perceived as a cost of doing business. Private

consumers on the other hand, 65%, are predominantly concerned with insurance premiums and treat the driving record as a secondary issue. There are clearly two market segments here requiring different advertising focal points based on perceived need.

Service fees merit discussion in more detail as the statistics do not reveal the qualifications in the answers of most respondents. 28% of all respondents view fees as inexpensive for value received. 38% view services as reasonable. Only 34% of all respondents view services as very expensive <u>but</u> the great majority claimed "you get what you pay for". As such, the service is deemed essential for the client and supposed high prices are not a deterrent for most people but a reinforcement and validation of the quality of service they will receive. Granted in times of economic recession the client may not have a choice on whether or not he/she is able to afford the services of a POINTTS agent but ultimately they will find a way based on the perceived need and the high quality of the service. Although a "pre-authorized payment plan" pro forma exists it is highly under-utilized by agents.

Of all respondents 93% said they would use POINTTS again if they required the services of a traffic court agent. This is consistent with answers given on agent and service levels.

Additional answers of interest, although statistically insignificant, should highlight areas that do not require specific target market advertising; only 5% said they wanted justice, that they were wrongly charged and 11% just simply wanted to beat the system. Current advertising is targeting on the small group "wrongly charged".

RECOMMENDATIONS

1. Although media attention was lavish during the mid to late 1980's free attention to POINTTS has all but disappeared. However, the POINTTS name has been established as a generic phenomenon and there is opportunity to capitalize on this commonality in a formal advertising campaign, ie. "We did it first and we still do it best!" As exclusivity has been lost with the onslaught of independent agents, superiority with respect to specialization - "we do it better" - should be focal.

2. Community involvement, especially with regards to ethnic groups is not being adequately explored. A greater niche can be carved into this area without the exploitation evident in independent agent practices.

3. With the advent of night court only for minor traffic violations - although day court still remains for violations lodged in the involvement of an accident - agents are faced with the dilemma of working nights or finding alternative ways of servicing clients. Summary offences should be addressed as a extremely lucrative area with great potential. There is some attention being given to this already in that POINTTS held a working conference for all franchisees for four days in March,

1994, where one day was spent in intensive study of this field. However, agents are reluctant to embark on the defence of summary offences as they will be before a "real judge" and do not think they would be credible. As well the Criminal Code is perceived as not very user friendly. In the researcher's opinion POINTTS agents would be better at defending an action than a lawyer would be. It involves an education process for agents as they are experiencing a vacuous fear. This education process is somewhat started but more is required to be done.

4. Market segmentation analysis should be formally undertaken if it has not yet been employed. In this way prospective target groups can be identified and effective marketing plans can then be developed. An important aspect to this analysis is that POINTTS should ask itself the question, "Who do we want to provide service to?" For example, the most lucrative target groups are perhaps people who drive for a living. Targeting employers such as trucking companies as well as individuals, etc. should be evaluated.

5. This survey is by no means adequate to propose any substantive recommendations. It has but scratched the surface and provided the reader with an interesting and proposed overview, but nevertheless, food for thought.

POINTTS

"THE TRAFFIC TICKET SPECIALISTS"

March 7, 1994

Dear Valued Client:

Please be advised that we are conducting a customer survey to help us serve you better.

This survey is being conducted under the auspices of Professor John Kelly of the school of Legal and Public Administration, Seneca College in conjunction with an independant research project. We at POINTTS are pleased to assist Professor Kelly in his endeavour.

A representative from our office will be contacting you within the next few days to ask you a few questions regarding your experience with our services.

Your co-operation is much appreciated and will only take but a few minutes of your time.

Naturally, strictest confidence will be maintained.

As a token of our appreciation, in assisting with this survey, should you or a friend require our services in the next 6 months, this letter will entitle you to a 20% discount on our fees.

Sincerely,

POINTTS SCARBOROUGH

Ben Kouwenhoven
Larry Fraser

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